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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BRET SCHUNDLER, *in his official capacity as mayor of the City of Jersey City*, THE CITY COUNCIL OF JERSEY CITY, *and* THE CITY OF JERSEY CITY, NEW JERSEY,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, *on behalf of its members*, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, *and* ANN SORREL,
Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a municipally owned and erected holiday display consisting of a crèche, a menorah, a tree and a sign stating that the display and other cultural efforts throughout the year (which include commemorations of Ramadan and the Hindu New Year, as well as numerous entirely secular events) are all meant to celebrate the ethnic and cultural diversity of the citizenry, violates the Establishment Clause.

LIST OF PARTIES

The caption of this case contains the names of all parties to the proceeding in the court below.

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No. _____

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AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, *on behalf of its members*, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, *and* ANN SORREL,
Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

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Petitioners respectfully seek a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is reported at 104 F.3d 1435 (3d Cir. 1997). The opinion of the District Court (App. 40a) is reported at 931 F. Supp. 1180 (D.N.J. 1996). The December 21, 1995 order of the District

Court (App. 61a) is unreported. It was announced in an opinion delivered from bench on December 18, 1997. (App. 56a).

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit was entered on January 13, 1997. (App. 65a). The Court of Appeals entered an amended judgment on February 18, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court's jurisdiction was based on 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners seek review of a decision of the Court of

Appeals for the Third Circuit, which struck down under the Establishment Clause a municipal holiday display consisting of a Christmas tree, a crèche, a menorah and a sign announcing that the display, and others throughout the year, were a celebration of cultural and ethnic diversity. The Court of Appeals' decision rested in significant measure on its stated disagreement with Justice O'Connor's approach to endorsement analysis, and on its preference for the approach taken by Justice Stevens in his dissent in *Capitol Square Review & Advisory Board v. Pinette*, ___ U.S. ___, 115 S. Ct. 2440 (1995).

1. Factual Background

The City of Jersey City is one of the most ethnically and culturally diverse cities in the country. According to the 1990 census, 24% of its residents are foreign-born, and 41% speak a language other than English at home. Aff. of Mayor Schundler, ¶ 2. The City has long made a practice of celebrating its diversity through a wide variety of cultural and ethnic displays, parades, celebrations, exhibits, flag-raisings and proclamations. (App. 70a-73a).

Most of the City's diversity celebrations are entirely secular, encompassing a wide variety of events and displays, including a Dominican Flag Raising ceremony and cultural program, Republic of India Day, an African Art exhibit in City Hall, and Greek Independence Day, among many others. *Id.* A few include some religious elements. In addition to the crèche and menorah display at issue here, the city annually commemorates Ramadan and, in conjunction with the United Hindu Federation of New Jersey, annually holds a Grand Phagwah Parade to celebrate the Hindu New Year. *Id.*

Each December the City places a display on the plaza in front of City Hall consisting of a crèche, a menorah, and a

Christmas tree. Like all of the city's displays and cultural events, this display is accompanied by a sign that reads: "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples." (App. 69a).[1]

2. The District Court Proceedings

On December 21, 1994, Plaintiffs filed suit in New Jersey State Court against the City, Mayor Schundler and the City Council, challenging the display of the menorah, crèche, tree, and explanatory sign under the Establishment and Equal Protection Clauses and various provisions of the New Jersey Constitution.

On January 19, 1995, the City removed the action to the United States District Court for the District of New Jersey.

On November 28, 1995, the District Court granted Plaintiffs' motion for summary judgment on their Establishment Clause claims. (App. 54a). It likewise granted their motion under the parallel provision of the New Jersey Constitution, finding that the New Jersey Supreme Court construes it according to federal Establishment Clause jurisprudence. (App. 52a). Finally, the District Court ruled in favor of the City on Plaintiffs' Equal Protection Clause Challenge and on its

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[1]Both the District Court and the Court of Appeals noted that 1994, when Plaintiffs filed their suit, was anomalous because Hanukkah began unusually early, on November 28, so the City's menorah was taken down shortly before its crèche went up. Such an anomaly will not occur again until 2013. Schundler Aff. ¶ 9. Recognizing this, both the District Court and the Court of Appeals analyzed the annual winter display as including both a menorah and a crèche displayed simultaneously. (App. 22a); (App. 50a-51a).

claims under two other provisions of the New Jersey Constitution. *Id.*

In striking down the City's display, the District Court found that, notwithstanding the sign and the year-round cultural celebration policy, the display endorsed religion because there were no secular symbols to "dilute" its religious message. (App. 50a-51a).[2] The Court permanently enjoined the Defendants from erecting the crèche and menorah display or any other substantially similar display.

The City announced it would appeal the decision. In the meantime, it erected a provisional display consisting of the same menorah and crèche, together with a plastic figure of Santa Claus, a sleigh, an evergreen tree decorated with Kwanzaa symbols, and a plastic Frosty the Snowman, along with the City's by-then-familiar sign: "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples." (App. 7a). In short, the City erected a display that was now far more diverse, if somewhat less tasteful, than the one this Court approved in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

Plaintiffs nevertheless moved for contempt and for an injunction against the new display. On December 18, 1995, the District Court denied both motions. It found the new display to be constitutional. In the words of the District Court, "by making these additions defendants have sufficiently demystified

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[2]As the Court of Appeals noted, (App. 5a), the District Court inexplicably missed the presence of the Christmas tree, to which all parties had stipulated. (App. 70a). In accordance with the parties' stipulation, the Court of Appeals considered the tree to be part of the display. (App. 22a).

the ho[ ]ly, they have sufficiently desanctified sacred symbols, and they have sufficiently deconsecrated the sacred . . . ." (App. 57a).

The District Court then modified its November 28 judgment to require that "If defendants elect to bring their display into compliance with the legal standards set forth in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Allegheny,* by erecting other holiday exhibits to accompany the Nativity Scene and Menorah, the defendants are ordered to maintain such other exhibits for as long as the Nativity Scene and Menorah are on display . . . ."[3]

On December 20, 1995, the City filed timely notices of appeal from both the original November 28, 1995 judgment and the December 21, 1995 judgment announced December 18.[4] Plaintiffs cross-appealed from the December 21, 1996 decision. The Court of Appeals consolidated the appeals.

3. The Court of Appeals' Opinion.

On January 13, 1997, a unanimous panel[5] affirmed the November 28, 1995 judgment, which had struck down the

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[3]By thus holding that *all* of the accompanying paraphernalia was constitutionally required, the District Court implicitly held that the Christmas tree, whose presence it had earlier missed, and the sign celebrating diversity were not sufficient by themselves to "desanctify" and "deconsecrate" the crèche and menorah.

[4]See Fed. R. App. P. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order but before the entry of the judgment is treated as filed on the date of and after the entry.").

[5]The panel was composed of Judges Nygaard, Lewis and McKee.

original display. (App. 1a). It also vacated the December 21 judgment, which had upheld the provisional, revised display, and remanded that portion of the case for reconsideration by the District Court.[6]

a. The Original Display.

The City's original display of a crèche, a menorah, a tree, and a sign celebrating diversity was unconstitutional, the Court explained, because it "expressed a religious preference by erecting a religious display through the expenditure of taxpayer dollars." (App. 22a)(footnote omitted). That was so, the Court said, because a "menorah is a religious symbol. And when displayed with a crèche, the menorah's religious significance is emphasized." *Id.* That, the Court thought, made the display a "dual endorsement of Christianity and Judaism." *Id.* The Court dismissed the presence of the tree as a "token" gesture. (App. 35a). It characterized the sign as "proudly proclaim[ing] that the display was sponsored by Jersey City," (App. 23a), but did not analyze the sign's central message—that all of the cultural efforts throughout the year were celebrations of diversity—except to dismiss it summarily. (App. 29a & n.14).

The Court did address the City's diversity policy more generally, rejecting it for what the Court described as three reasons. First, the Court simply reiterated its conclusion that "government endorsement of one or any number of different

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[6]The Court's opinion, written by Judge Lewis, was decided solely under the federal Establishment Clause. It mentioned the state constitutional claim only once, in its factual recitation, and did not undertake any state-law analysis or make any state constitutional ruling. See App. 7a.

religions is unconstitutional." (App. 24a).[7]

Second, and more importantly, the Court announced that "a reasonable observer cannot be presumed to be aware of the various religious and cultural celebrations that take place throughout the year in Jersey City." (App. 24a). In so ruling, the Court settled on a new and narrow definition of a reasonable observer. The Court noted the differing views of Justice O'Connor in her concurrence in *Capitol Square Review & Advisory Board v. Pinette*, ___ U.S. ___, 115 S. Ct. 2440 (1995), and of Justice Stevens' dissent in that case. (App. 26a-27a). The Court then announced that it "agree[d] with Justice Stevens that assuming the reasonable observer is aware of 'history and context' when viewing a municipality's religious display is a 'highly unlikely supposition'". (App. 28a)(quoting *Capitol Square*, ___ U.S. ___, 115 S. Ct. at 2470 (Stevens, J., dissenting).[8] Indeed, the panel even went on to question the continuing validity of the concept of a "reasonable observer" at all: "we note the nearly impossible task of giving content to the hypothetical reasonable observer in our multicultural society." (App. 27a n.12).

The Court of Appeals concluded that its reasonable

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[7]The Court added, somewhat cryptically, that it did not mean to "suggest that all government celebrations of diverse cultures need be free of all religious content. Indeed, such celebrations would likely be impossible given religion's inherent role in many different cultures." (App. 26a). Petitioners respectfully note that that is precisely our point.

[8]The Court of Appeals said, for example, that someone "who is a new resident to Jersey City, has no understanding of the history of the community, but has a strong sense of his or her own faith, a faith not depicted in the display" is every bit as reasonable an observer as a more informed city resident. (App. 28a). *Cf. Capitol Square*, ___ U.S. ___, 115 S. Ct. at 2469-2470 (Stevens, J., dissenting).

observer would not be aware of the City's other cultural efforts. The Court dismissed the effect on *any* observer, reasonable or otherwise, of the sign informing him or her of those efforts. (App. 29a & n.14).

The Court's third justification for rejecting the City's diversity policy was the Court's announcement that the City's "overall plan to celebrate different religions and cultures . . . . [is] a quintessential type of government action that fosters an excessive entanglement with religion." (App. 29a)(quotations, citation omitted). Relying heavily on *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court concluded that Jersey City's cultural efforts might lead to undue conversations with various clerics and also risked political divisiveness. (App. 31a-32a).

b. The Provisional, Revised Display

Finally, the Court of Appeals vacated and remanded the District Court's December 22 judgment, which had upheld the modified display containing the Santa, sleigh, Frosty, and Kwanzaa symbols for reconsideration consistent with the Court of Appeals' opinion. The Court of Appeals chided the District Court in equal measure for, on the one hand, requiring that "sacred symbols" be "desanctified," and on the other hand for concluding that the addition of the Santa Claus, the sleigh, the Frosty, and the Kwanzaa symbols made the menorah-crèche-tree-sign display constitutional under *Lynch* and *Allegheny*. (App. 33a).

The Court of Appeals clearly signalled the result the District Court should reach in reviewing the revised display. In its "view, the City's addition of Santa, Frosty, and the red sled did little to secularize" the message of endorsement that its version of a reasonable observer would perceive. (App. 36a). Indeed, the Court of Appeals seems to have formulated a *per se*

rule that no crèche display, regardless of what else it includes, may ever be erected at the seat of government. "Government display of a crèche . . . cannot convey a meaning separate from the very act it is meant to portray." (App. 35a); see also App. 35a-36a. ("We reiterate that Jersey City's display of the crèche at the seat of City government power impermissibly conveyed the message of government endorsement of religion."). Consequently, the Court affirmed the District Court's judgment striking down the original display, and all but reversed the District Court's judgment upholding the modified, provisional display. (App. 36a-37a).[9]

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *ALLEGHENY*, AS WELL AS WITH DECISIONS OF OTHER COURTS OF APPEALS

This Court has upheld the display of both a municipal crèche, *Lynch v. Donnelly*, 465 U.S. 668 (1984), and a menorah, *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), when the context demonstrated that such seasonal displays were not intended as endorsements of religion, but as cultural celebrations. Nevertheless, the lower federal courts are in considerable disarray over how to evaluate the context of such displays. In

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[9]Judge McKee filed a brief concurring opinion in which he expressly agreed with the reasoning of the opinion of the Court, but expressed his view that *Capitol Square* was irrelevant because it involved only private speech. (App. 37a-38a).

fact, the lower court's decision in this case conflicts with decisions of the courts of appeals for the Second, Sixth, Ninth, Tenth and Eleventh Circuits.

The conflict follows upon this Court's recent decision in *Capitol Square v. Pinette*, ___ U.S. ___, 115 S. Ct. 2440 (1995). In *Capitol Square*, Justice O'Connor, joined by Justices Souter and Breyer, set forth a mode of endorsement analysis that contrasted sharply with that proposed by Justice Stevens in his dissent. Justice O'Connor wrote in her concurrence that a "fundamental point of departure" between the two views "concerns the knowledge that is properly attributed to . . . . the 'reasonable observer.'" ___ U.S. ___, 115 S. Ct. at 2454 (O'Connor, J., concurring)(quotations, citations omitted). "In [Justice O'Connor's] view, proper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby postulated by [Justice Steven's] dissent." *Id.* at 2455. Accordingly, she stressed "the reasonable observer in the endorsement inquiry must be deemed aware of the *history and context of the community and forum* in which the religious display appears." *Id.* (emphasis added). Thus, the knowledge attributable to a reasonable observer could not "be limited to the information gleaned simply from viewing the challenged display." *Id.*

In contrast, Justice Stevens proposed a much lower Establishment Clause threshold. Justice Stevens wrote that, in his view, "[r]easonable people have differing degrees of knowledge." *Id.* at 2469 (Stevens, J., dissenting). Therefore, for a "religious display to violate the Establishment Clause . . . it is enough that *some* reasonable observer would attribute a religious message to the State." *Id.* at 2470 (Stevens, J., dissenting)(emphasis in original).

The *Capitol Square* Court itself left the question

unresolved. Neither Justice Scalia's plurality opinion nor Justice Ginsburg's dissent opined on the subject.

This "fundamental point of departure," which *Capitol Square* highlighted but did not resolve, is now dividing the courts of appeals. As described below, several courts of appeals expressly follow Justice O'Connor. In contrast, the Court of Appeals in the present case has expressly declined to follow Justice O'Connor's approach and has instead explicitly embraced Justice Stevens' dissenting position. *See* App. 28a. The result is something approaching chaos as the lower courts make constitutional law by choosing sides between a concurrence and a dissent. What makes this is all the more troubling is that this disagreement reaches beyond the confines of religious display cases to those involving all types of Establishment Clause challenges.

The Court of Appeals for the Second Circuit has expressly adopted Justice O'Connor's approach. That Court stresses that because

> the outcome of *Capitol Square* turned on the factors articulated by Justices O'Connor and Souter, we believe that the lower courts must be guided by their concurring opinions. . . . *Justice O'Connor rejected the dissenting view of Justice Stevens* that the test should focus on a casual observer and emphasized that *the relevant person "must be deemed aware of the history and context of the community and forum in which the religious display appears.*"

Creatore v. Town of Trumbull, 68 F.3d 59, 61 (2d Cir. 1995)(upholding private crèche in public forum in front of town hall; remanding for factual determination)(quoting *Capitol*

Square, ___ U.S. ___, 115 S. Ct. at 2455 (O'Connor, J., concurring in part and concurring in the judgment))(emphasis added).

The Court of Appeals for the Ninth Circuit likewise follows Justice O'Connor's approach. *See Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996)(upholding municipal statue of Aztec deity Quetzalcoatl)(the "hypothetical observer [is] informed as well as reasonable; we assume that he or she is familiar with the history of the government practice at issue.")(quotations, citation omitted).[10]

The Tenth Circuit expressly says that it follows Justice O'Connor's *Capitol Square* analysis. *See Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir.), *cert. denied*, 116 S. Ct. 1830 (1996)(upholding National Motto "In God We Trust")(quoting *Capitol Square*, ___ U.S. ___, 115 S. Ct. at 2455 (O'Connor, J., concurring)).[11]

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[10]*See also Peck v. Upshur County Bd. of Educ.*, 941 F. Supp. 1465, 1476 (N.D. W. Va. 1996) (upholding private distribution of Bibles in public school under *Capitol Square* analysis)("In contrast to the observer offered by Justice Stevens in his dissent, Justice O'Connor endows her 'reasonable observer' with a higher degree of knowledge than a 'casual passerby'").

[11]It is not entirely clear, however, that the Tenth Circuit understands the reasonable observer test in the same manner as other courts. A line of cases, both before and since *Capitol Square*, seem to be articulating a somewhat different test. Those cases do not look at either the casual passerby or a construct of the reasonable person. Rather, they look "only to the reaction of the *average* receiver of the government communication or *average* observer of the government action." *Robinson v. City of Edmond*, 68 F.3d 1226, 1230 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 1702 (1996)(emphasis added)(*quoting Friedman v. Bd. of County Comm'rs of Bernalillo County*, 781 F.2d 777, 781 (10th Cir. 1985), *cert.*
(continued...)

The Court of Appeals for the Eleventh Circuit, while it has not yet formally invoked *Capitol Square*, nevertheless follows Justice O'Connor's approach. *Chabad-Lubavitch v. Miller*, 5 F.3d 1383, 1392 (11th Cir. 1993)(upholding private menorah display in State Capitol rotunda)("In the mind's eye, the reasonable observer sees the menorah display as but one of a long series that has taken place since the [forum] was opened")(brackets in original). In short, the Second, Ninth, Tenth and Eleventh Circuits have all adopted the approach set forth by Justices O'Connor, Souter and Breyer in *Capitol Square*.

The Court of Appeals in this case disagrees. In fact, its disagreement could not be more explicit. It notes that Justice Stevens "has rejected Justice O'Connor's 'ideal' reasonable observer, finding her conception to be more akin to a 'well-schooled jurist' than a mere reasonable observer." (App. 27a). Again, the lower court emphasizes the divergence. "[R]ejecting the assumption that reasonable viewers are aware of the history" of the forum at issue, "Justice Stevens noted that Justice O'Connor 'apparently would not extend Establishment Clause protection to passers by who are unaware of Capitol Square's history.'" (App. 27a)(quoting *Capitol Square*, ___U.S.___, 115 S. Ct. at 2470 n.14 (Stevens, J., dissenting)). The lower court then flatly concludes: "We agree with Justice Stevens that assuming the reasonable observer is aware of 'history and context' when viewing a municipality's religious display is 'a

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[11](...continued)
denied, 476 U.S. 1169 (1986)); *see also Foremaster v. City of St. George*, 882 F.2d 1485, 1491 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990)("We inquire what an average observer would perceive when viewing the action of the City."). This, of course, only deepens the disagreement among the courts of appeals.

highly unlikely supposition.'" (App. 28a)(quoting *Capitol Square*, ___ U.S. ___, 115 S. Ct. at 2470 (Stevens, J., dissenting)).

Accordingly, the Court of Appeals refused to assume that the reasonable observer it was constructing had any knowledge of the wide variety of cultural efforts the City provides, from a Hindu New Year parade to a Dominican Flag Raising and Cultural Program. Indeed, the lower court was so resolute in its refusal to impute knowledge to its reasonable observer that it gave only short shrift to the City's sign which explicitly informed *all* observers, reasonable and otherwise, that "through this display *and others throughout the year*, the City of Jersey City is pleased to *celebrate the diverse cultural and ethnic heritages* of its peoples." (App. 29a)(emphasis added). The "general awareness" provided by the sign, the Court said, would be "obscured by the physical presence of the symbols of Christianity and Judaism before City Hall." *Id.*

Indeed, the lower court seems to have promulgated a *per se* rule against ever erecting crèche displays at the seat of government, regardless of what else such displays may contain. "Government display of a crèche," the Court of Appeals writes, "cannot convey a meaning separate from the very act it is meant to portray." (App. 35a); see also App. 35a-36a ("We reiterate that Jersey City's display of the crèche at the seat of City government impermissibly conveyed the message of government endorsement of religion.").

On the strength of that analysis, the lower court thus managed to strike down a display that even in its *physical* context (to say nothing of its *temporal* context) was more broadly and explicitly diverse than the menorah, tree and salute-

to-liberty sign approved by this Court in *Allegheny*.[12] In that respect, the lower court's decision conflicts, not only with *Allegheny* itself, but also with two post-*Allegheny* decisions of the Court of Appeals for the Sixth Circuit. *See Doe v. Clawson*, 915 F.2d 244 (6th Cir. 1990)(upholding display of crèche accompanied by various other symbols in front of city hall); *ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990)(upholding permanent biblical stable, accompanied by a disclaimer sign and available as a public forum, on State Capitol grounds); *see also Colorado v. Freedom From Religion Foundation*, 898 P.2d 1013 (Colo. 1995), *cert. denied*, 116 S. Ct. 909 (1996)(upholding Ten Commandments Monument on State Capitol grounds); *King v. Village of Waunakee*, 185 Wis. 2d 25, 517 N.W.2d 671 (1994)(upholding municipal park's display of crèche, Christmas trees, Star, light-draped flagpole and sign reading, in part, "Whatever your religion or beliefs, enjoy the holidays").

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[12]In *Allegheny*, the Christmas tree and menorah were accompanied by a sign reading, under the title "Salute to Liberty," "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Allegheny*, 492 U.S. at 582. This required the reasonable observer to look at the menorah, the Christmas tree, then at the "Salute to Liberty" sign with its reference to the "flame of liberty and our legacy of freedom," and infer that diversity and religious liberty were being celebrated rather than religion being advanced. *See id.* at 635 (O'Connor, J., concurring). In Jersey City, the reasonable, informed observer would see a religious symbol of one faith, a religious symbol of another faith, a traditional tree, and a sign that explicitly ties the display to a broad and inclusive policy of celebrating cultural and ethnic diversity. What had to be inferred from the sign in *Allegheny* is said straight out in Jersey City—the display is a celebration of diversity and pluralism.

In sum, there is a sharp disagreement between the Court of Appeals in this case, on the one hand, and that of the Sixth Circuit, on the other, over whether the Establishment Clause ever permits state cultural displays containing crèches to be located close to the seat of government. And there is an even sharper, broader, and growing disagreement between the lower court here and several other courts of appeals over the constitutional standards used to evaluate such claims generally.

II. THE PRESENT CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CONFLICTS

A. There Are No Procedural Obstacles To Reaching The Issues.

Although the District Court's decision invoked both the federal Establishment Clause and the New Jersey No Religious Preference Clause (App. 52a), that presents no impediment to plenary review in this Court. That is so for two reasons. First, the District Court interpreted the New Jersey State Constitution to be identical with the federal Establishment Clause and relied entirely on federal precedent. *Id.* Second, and more importantly, the Court of Appeals did not make any ruling at all on state constitutional grounds. In fact, its only mention of the New Jersey Constitution was a single reference in the procedural history portion of its opinion. (App. 6a). Its own analysis was confined completely to the federal Establishment Clause.

The Court of Appeals' order remanding part of the case to the District Court likewise poses no obstacle to this Court's considerations. The crux of this case concerns the part *not* remanded: the Court of Appeals' affirmance of the District Court's judgment striking down Jersey City's original display.

Moreover, the facts concerning the second, provisional display are all undisputed. There is no more fact-finding to be done by the District Court. The question before this Court is one of pure law. And the Court of Appeals' position on that question has been forcefully articulated. Indeed, it is unclear why the Court of Appeals thought a remand on the revised, provisional display desirable at all since it had so strongly stated its views on the legal interpretation to be given the undisputed facts. See App. 37a.

B. The Facts Of The Present Case Are Well-Suited To Resolving The Issues

The facts of the present case are ideal for resolution of the issues dividing the courts of appeals. First, there is a veritable menu of *spacial* contexts from which to choose: there is the tree-menorah-crèche-and-sign that was the original display; or there is the original display plus the Santa Claus and sleigh, Frosty and Kwanzaa symbols that was the modified, provisional display; or, finally, there is the more extreme position advanced by respondent ACLU: that only the entire extravaganza present in *Lynch*, in a setting remote from the seat of government, would permit municipal display of a crèche.

Second, the record in this case demonstrates a rich and varied *temporal* context for the menorah and crèche, including a wide assortment of municipally celebrated secular events as well as a proclamation of Ramadan and a parade in honor of the Hindu New Year—tied together by the same sign which appears at all such displays: "Through this display and others throughout the year the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples." Jersey City's admirable record of celebrating a diverse array of cultures, including whatever religious elements are appropriate to them, thus accords well with this Court's

decisions in *Lynch* and *Allegheny*.

What the reasonable observer would observe in Jersey City is a series of government cultural activities that accurately mirror the diverse cultures of the surrounding society. As even the Court of Appeals in this case recognized, cultural celebrations that are "free of all religious content" would "likely be impossible given religion's inherent role in many different cultures." (App. 26a). An attempt to mirror a society's culture(s) while masking the religious parts, should thus be quite alarming to a well-informed reasonable observer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 11, 1997

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5865, 95-5866 and 96-5023

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members; ROBERT LANDER; ADAM JACOBS; JOEL SOLOW; and ANN SORREL

vs.

BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, New Jersey; THE CITY COUNCIL OF JERSEY CITY, NEW JERSEY; CITY OF JERSEY CITY, NEW JERSEY

Bret Schundler, the City Council of Jersey City, and the City of Jersey City, New Jersey,
Appellants No. 95-5865 and No. 95-5866.

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members; ROBERT LANDER; ADAM JACOBS; JOEL SOLOW; and ANN SORREL
Appellants No. 96-5023

vs.

BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, New Jersey; THE CITY COUNCIL OF JERSEY CITY, NEW JERSEY; CITY OF JERSEY CITY, NEW JERSEY

[Filed January 13, 1997]

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. No. 95-cv-00206)

ARGUED AUGUST 7, 1996

BEFORE: NYGAARD, LEWIS and McKEE, *Circuit Judges.*

(Filed January 13, 1997)

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OPINION OF THE COURT

LEWIS, *Circuit Judge.*

Toward the end of each calendar year, people around the world celebrate what has come to be known as "the holiday season." Some do so by adorning their lawns with various religious or secular ornaments, which are usually intended to convey an individual's interpretation of the holiday season. Thus, while some may subtly express an acknowledgment of the season through a lighted tree or a candle in a window, others may prefer a dazzling array of lights, ornaments, and a cast of religious and secular characters.

Although the Constitution provides no guidance on matters of taste or aesthetics, it does provide protection for citizens to erect even the most energy-consuming, taste-challenged holiday display. In particular, the Free Exercise Clause guarantees the citizen's right to celebrate the season's religious origins. This right is reinforced by the Establishment Clause, which prevents the government from imposing its religious will upon its citizens. Thus, while the individual citizen can express himself or herself freely during the holiday season through the display of religious symbols, the Establishment Clause imposes constraints on the content of government-sponsored holiday displays. By restricting government displays, the Establishment Clause prevents government from sponsoring, celebrating, or endorsing religion.

The uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays. As a result, threats of municipal display lawsuits and restraining orders have become almost as

much a part of the holiday season as last-minute shopping sprees.

In this case, we must determine whether the City of Jersey City, New Jersey, should be permitted to erect a display containing a crèche and a menorah on the lawn in front of its City Hall. We will affirm the district court's holding that the City's original display of the crèche and the menorah violated the Establishment Clause. In addition, we will hold that the district court applied the wrong standard to determine that the City's second display, which added Santa Claus, Frosty the Snowman, and a red sled to the crèche and menorah, did not violate the Establishment Clause.

I.

Facts and Procedural History

Appellees and Cross-Appellants, the American Civil Liberties Union of New Jersey ("ACLU") and four residents of Jersey City brought this action against Appellants and Cross-Appellees, the City of Jersey City (the "City"), its mayor and its city council. The ACLU sought to preliminarily and permanently enjoin the City from erecting and maintaining a holiday display containing a crèche and a menorah on the lawn (also known as "City Hall Plaza") in front of its City Hall. The City has displayed the crèche and menorah in City Hall Plaza for at least the past thirty years. Both the crèche and menorah, as well as the property on which the displays are located, are owned by the City.

Jersey City displays its crèche, a representation of the Christian nativity scene, on the days immediately preceding and following Christmas. The crèche is a depiction of the day Jesus was born in a manger in Bethlehem. The City's display is approximately twelve feet long by eight feet wide and includes replicas of Joseph, Mary, Jesus, and the Three Wisemen, as well as traditional manger imagery such as farm animals and

hay. The event depicted by the crèche has particular significance to the Christian religion, which worships Jesus as the Son of God and the Messiah.

Jersey City displays its menorah, a nine-branched candelabrum, during the Jewish holiday of Hanukkah. A menorah is used by Jews to commemorate the Miracle of the Oils, a seminal event in Jewish history that took place during the rededication of the Temple of Jerusalem. The lighting of the menorah is the central ritual of Hanukkah. As the Supreme Court recognized in *Allegheny County v. ACLU*, 492 U.S. 573, 587 & n.33 (1989), in contrast to the Christian celebration of Christmas, Hanukkah is not one of the central religious holidays of Judaism.

Jersey City customarily displays the menorah on the Plaza lawn to the left of the main entrance to City Hall and the crèche on the lawn to the right. Because the Hanukkah festival normally overlaps with the Christmas season, the menorah and crèche are usually displayed at the same time. In 1994, however, when the present action was initiated, Hanukkah fell unusually early on the calendar (November 28 to December 5). Consequently, the City took down the menorah display the day before it erected the crèche. The City also decorated an evergreen tree with Christmas ornaments on the Plaza lawn on December 14. Other than this tree, the crèche and menorah displays were unaccompanied by any other traditional secular symbols of the holiday season.[1]

---

[1]It is unclear whether the district court was aware that the 1994 display contained the Christmas tree or whether it concluded that the tree was too far removed from the crèche and the menorah to be considered part of an integrated holiday display. *See* Dist. Ct. Op. at 11-12. The Christmas tree is an evergreen tree that stands on the City lawn. During the holiday season, the City typically transforms the evergreen into a Christmas tree by decorating it with lights and other ornaments. The district court's possible

(continued...)

The ACLU sent a letter to Jersey City Mayor Bret Schundler asking the City to reevaluate its practice of displaying religious symbols on public property. In response, the City erected a sign adjacent to its display in front of City Hall on December 16, 1994, which read: "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples." Thus, when the ACLU initiated this lawsuit, the Jersey City holiday display was comprised of a crèche, a Christmas tree, and the sign.

On December 21, 1994, the ACLU filed a complaint in the Superior Court of New Jersey seeking a declaratory judgment and a permanent injunction to prevent the City from displaying a menorah and a crèche on the Plaza in front of Jersey City City Hall during the winter holiday season. In their five-count complaint, the ACLU alleged violations of the First and Fourteenth Amendments of the United States Constitution, as well as three provisions of the New Jersey Constitution.[2] The City removed the action to federal district court. On September 19, 1995, both parties moved for summary judgment.

On November 28, 1995, the United States District Court

(...continued)
confusion regarding the tree may have been caused by the fact that the tree was not visible in the photographs of the display that were entered into the record. For whatever reason, the district court did not consider the tree to be a component of the 1994 display.

[2]The five counts are based on alleged violations of the following: (1) the Establishment Clause of the First Amendment of the United States Constitution; (2) the Equal Protection Clause of the Fourteenth Amendment; (3) the Religious Preference Clause of Article I, Paragraph 4 of the New Jersey Constitution; (4) Article I, Paragraph 3 of the New Jersey Constitution; and (5) Article I, Paragraph 5 of the New Jersey Constitution, the state equivalent of the Federal Equal Protection Clause.

for the District of New Jersey issued an order granting the ACLU's motion for summary judgment on counts one and three, sustaining their claims based upon the Establishment Clause of the First Amendment of the United States Constitution and the Religious Preference Clause of the New Jersey Constitution. *ACLU of N.J. v. Schundler*, No. 95-206, 1995 WL 869972, at *8 (D.N.J. Nov. 28, 1995). The district court entered a permanent injunction prohibiting the City from "erecting the crèche and menorah display described in the complaint in this action, or any substantially similar scene or display at the front entrance of the City of Jersey City City Hall or on other property owned, maintained, or controlled by the defendants in their official capacities." *ACLU of N.J. v. Schundler*, No. 95-206 (D.N.J. Nov. 28, 1995) (order granting injunction).

On December 13, 1995, despite the district court's injunction, Jersey City erected its annual holiday display in front of City Hall. The 1995 display consisted of the traditional crèche and menorah but also included a four-foot tall plastic figure of Santa Claus, a four-foot tall plastic figure of Frosty the Snowman, and a red wooden sled. Frosty and the sled were placed on the same side of the Plaza as the crèche, and Santa was placed near the menorah and the Christmas tree. The 1995 version of the crèche was slightly different from the 1994 version. The figures in the crèche were taken out of the manger and placed in a circle to one side of the empty manager. The City Hall Plaza Christmas tree was also slightly different, as it was decorated with Kwanzaa symbols in addition to the usual lights and holiday ribbons. This modified 1995 display was also accompanied by two 20" x 30" signs bearing the City seal and the statement: "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritage of its people."

In response to the City's 1995 display, the ACLU

submitted applications to the district court for both a preliminary injunction against further display of the menorah and crèche and a judgment that the City was in civil contempt of the injunction issued November 28, 1995. On December 18, 1995, the district court issued an order denying the ACLU's request for a preliminary injunction and its petition for contempt. The court concluded that the addition of Santa and Frosty, as well as the sled and the Kwanzaa symbols, brought the City's display into compliance with the Establishment Clause. The district court thus modified its order of November 28, 1995, to require the City to maintain the additional secular holiday exhibits (*i.e.*, Frosty, Santa, and the sled) in order to remain in compliance with the Establishment Clause. *ACLU of N.J. v. Schundler*, No. 95-206 (D.N.J. Dec. 21, 1995) (order denying preliminary injunction). The district court, in entering the order, stated:

> I conclude that by making these additions defendants have sufficiently demystified the [holy], they have sufficiently desanctified sacred symbols, and they have sufficiently deconsecrated the sacred to escape the confines of the injunctive order in this case.

Tr. at 12.

The City timely filed notices of appeal on December 20, 1995, from both the November 28 order and injunction, as well as the December 18 order modifying that injunction. The City asserts that the district court erred by concluding both that its 1994 holiday display of a crèche and a menorah was unconstitutional and that its 1995 holiday display was constitutional as modified. In other words, the City asserts that both its unmodified 1994 display and its modified 1995 display were in compliance with the Establishment Clause. On January 4, 1996, the ACLU cross-appealed from the December 18, 1995 order denying their second application for injunctive relief. The ACLU maintains that both displays violate the Establishment

Clause of the First Amendment.

II.

The Supreme Court's Display Cases

The Establishment Clause of the First Amendment declares that "Congress shall make no law respecting an establishment of religion." U.S. Const. Amend. I. In the Supreme Court's seminal modern Establishment Clause case, *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), the Court recognized that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid all religions, or prefer one religion over another." The Court, paraphrasing Thomas Jefferson, stated that the First Amendment "has erected a wall between church and state." *Id.*

The wall-of-separation metaphor, however, overstates the actual level of separation of church and state the Court has required in its Establishment Clause jurisprudence. The Court has determined that government may acknowledge the nation's religious heritage and that not every law or practice that confers a benefit upon religious institutions is unconstitutional. *See Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).[3]

We have recognized that the much-maligned test arising out of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (the "*Lemon* test"), continues to provide the analytical framework courts must use to determine whether a particular practice violates the Establishment Clause. *ACLU of N.J. v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (in banc).

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[3]One commentator has noted that the Supreme Court's Establishment Clause jurisprudence suggests that "the wall of separation is about to resemble the one that divided Berlin -- demolished, yet ghostly and evocative." Ira C. Lupu, *The Trouble With Accommodation*, 60 Geo. Wash. L. Rev. 743, 768 (1992).

In *Black Horse Pike*, we stated:

> The *Lemon* test has been the subject of critical debate in recent years, and its continuing vitality has been called into question by members of the Supreme Court and by its noticeable absence from the analysis in some of the Court's recent decisions (including *Lee*). Nevertheless, *Lemon* remains the law of the land, and we are obligated to consider it until instructed otherwise by a majority of the Supreme Court.

Id. at 1484. The *Lemon* test is a three-pronged test requiring the following: (1) the statute or government practice must have a secular purpose; (2) its practical effect must be one that neither advances nor inhibits religion; and (3) the statute or government practice must not foster "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13.

The Supreme Court first applied the *Lemon* test to a government-sponsored holiday religious display in *Lynch v. Donnelly*, 465 U.S. 668 (1984). In *Lynch*, a 5-4 decision, the Court upheld the constitutional validity of a winter holiday display maintained by the city of Pawtucket, Rhode Island. The display was situated in a private park. The display itself was owned by the city and included a crèche, a wishing well, a Santa Claus house (with a live Santa), a Christmas tree, reindeer pulling Santa's sleigh, candy-striped poles, a "Seasons Greetings" banner, hundreds of colored lights, live carolers, and cutout figures of a clown, an elephant, and a teddy bear. *Id.* at 671. The Court, applying the *Lemon* test, found that: (1) the display, because it contained secular as well as religious symbols, had the legitimate secular purpose of recognizing and celebrating a national holiday; (2) the crèche did no more to advance or inhibit religion than the myriad government benefits and endorsements previously held constitutionally permissible; and (3) there was no evidence of administrative entanglement

of religion. *Id.* at 680-85.

Justice O'Connor's concurrence in *Lynch* focused primarily on the second prong of the *Lemon* test. She styled her approach as an "endorsement test," which stated that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 688 (O'Connor, J., concurring). The context of the particular government practice was at the core of Justice O'Connor's endorsement test. She stated:

> Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. *Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.*

Id. at 694 (emphasis added).

In *Allegheny County v. ACLU,* 492 U.S. 573 (1989), the Supreme Court again considered the constitutionality of a holiday display. *Allegheny County* involved two different displays. The first display was a crèche located on the Grand Staircase of the Allegheny County, Pennsylvania Courthouse. *Id.* at 580. The second display was a menorah placed next to a Christmas tree and a sign saluting liberty, all of which were located just outside the Pittsburgh City-County Building. *Id.* at 582. The crèche display was surrounded by a fence and a poinsettia floral frame and included small evergreen trees but did not include traditional secular holiday figures. The crèche

had at its crest an angel bearing a banner that proclaimed "Gloria in Excelsis Deo," which translates to "Glory to God in the highest." *Id.* at 580 & n.5. The menorah, on the other hand, was placed next to a Christmas tree and a sign saluting liberty.

The Court's decision in *Allegheny County* spawned several opinions and two different holdings. A 5-4 majority held that the display of the crèche in the county courthouse violated the Establishment Clause. A 6-3 majority upheld the constitutional validity of the display of a menorah next to a Christmas tree outside the City-County Building.[4]

Writing for the 5-4 majority, Justice Blackmun discussed the Court's move away from *Lemon* toward a "refined . . . definition of governmental action that unconstitutionally advances religion." *Id.* at 592. Focusing on the word "endorsement" put forth by Justice O'Connor's concurrence in *Lynch,* Justice Blackmun concluded that:

> The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

Id. at 594 (citing *Lynch,* 465 U.S. at 687 (O'Connor, J., concurring)).

Justices Blackmun and O'Connor represented the swing votes. Both Justices voted to allow the menorah and the Christmas tree display and to disallow the crèche display. To pinpoint the Court's reasoning in permitting the menorah and Christmas tree display while condemning the crèche display, we must analyze the rationale of the swing votes.

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[4]In *Allegheny County,* the ACLU specifically challenged the display of the menorah, not the Christmas tree.

Justice Blackmun began his opinion (writing for the majority) by recognizing that the crèche display at issue in the case conveyed "praise to God in Christian terms [which] is indisputably religious -- indeed sectarian -- just as it is when said in the Gospel or in a church service." *Id.* at 598. Justice Blackmun then distinguished *Lynch,* flatly rejecting the notion that *Lynch* rendered crèche displays per se constitutionally permissible. On the contrary, Justice Blackmun emphasized that nothing in the context of the display at issue detracted from the crèche's religious message. In addition, Justice Blackmun recognized that the crèche sat on the Grand Staircase in the courthouse, which was "the main and most beautiful part of the building that is the seat of county government." *Id.* at 599. As such,

> [n]o viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the crèche in this particular physical setting," *Lynch,* 465 U.S. at 692 (O'Connor, J., concurring), the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message.

Id. at 601. Thus, given the content and context of the crèche display, Justice Blackmun, writing for the majority of the Court, concluded that:

> *Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch,* and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause.

Id. at 602.

Later in his opinion Justice Blackmun, no longer writing for a majority of the Court, presented the reasons why he voted to allow the menorah and Christmas tree display. Justice Blackmun recognized that government celebration of Christmas and Hanukkah as religious holidays would violate the Establishment Clause,[5] but concluded that Allegheny County's display of a Christmas tree and a menorah "recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society." *Id.* at 616. His conclusion was based largely on the fact that he considered the Christmas tree to be a secular symbol due to the fact that "many Americans place Christmas trees in their homes without subscribing to Christian religious beliefs." *Id.* at 616-17. Justice Blackmun also relied heavily on the spatial context of the display, commenting that:

> The tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season.

Id. at 617.

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[5]In this discussion, Justice Blackmun stated that "[t]he display of a menorah next to a crèche on government property might prove to be invalid." 492 U.S. at 615 n.61.

In her concurrence, Justice O'Connor also focused on the question of endorsement. Reviving the endorsement test she formulated in her concurrence in *Lynch*, Justice O'Connor presented the reasons for treating the crèche in *Lynch* differently from the crèche in *Allegheny County*:

> In *Lynch*, I concluded that the city's display of a crèche in its larger holiday exhibit *in a private park in the commercial district* had neither the purpose nor the effect of conveying a message of government endorsement of Christianity or disapproval of other religions. The purpose of including the crèche in the larger display was to celebrate the public holiday through its traditional symbols, not to promote the religious content of the crèche. Nor, in my view, did Pawtucket's display of the crèche along with secular symbols of the Christmas holiday objectively convey a message of endorsement of Christianity.
>
> . . . I agree that the crèche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community. *In contrast to the crèche in Lynch, which was displayed in a private park in the city's commercial district as part of a broader display of traditional secular symbols of the holiday season, this crèche stands alone in the county courthouse. The display of religious symbols in public areas of core government buildings runs a special risk of making religion relevant, in reality or public perception, to status in the political community.*

Id. at 626 (O'Connor, J., concurring) (citations omitted)

(emphasis added).

Justice O'Connor agreed with Justice Blackmun that the menorah and Christmas tree display was constitutionally permissible for "reasons which differ somewhat." *Id.* at 632. Justice O'Connor, like Justice Blackmun, concluded that a Christmas tree was a secular object but disagreed that the menorah was largely secular in the context of the display. She viewed the menorah as "the central religious symbol and religious object" of Hanukkah. *Id.* at 633. The question for her, therefore, was whether "the Christmas tree is a predominantly secular symbol and, more significantly, [whether it] obscures the religious nature of the menorah and the holiday of Hanukkah." *Id.* In answering this question, Justice O'Connor concluded:

> By accompanying its display of a Christmas tree -- a secular symbol of the Christmas holiday season -- with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of the year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season. Although the religious and indeed sectarian significance of the menorah is not neutralized by the setting, this particular physical setting changes what viewers may fairly understand to be the purpose of the display -- as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.

Id. at 635 (citations omitted).

The Supreme Court revisited the Establishment Clause recently in *Capitol Square Review & Advisory Board v. Pinette*,

___ U.S. ___, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995). Again, the Court produced several opinions purporting to present the "correct" Establishment Clause analysis. *Capitol Square* is instructive to our analysis because, although it involves private religious expression in a traditional open forum, the Court indicated that it will likely apply an endorsement-test approach to determine the constitutionality of a public religious display.

In *Capitol Square*, the Court held that Ohio's denial of the Ku Klux Klan's application to display an unattended cross on the statehouse square could not be justified on the ground that granting a permit would have violated the Establishment Clause. Justice Scalia wrote for a 7-2 majority of the Court. *Id.* at 2447. A second portion of Justice Scalia's opinion, in which he rejected the application of Justice O'Connor's endorsement test to the privately-sponsored cross display, was a plurality opinion joined by Chief Justice Rehnquist and Justices Kennedy and Thomas. *Id.* at 2447-48. Justice O'Connor, joined by Justices Souter and Brennan, wrote separately to apply the endorsement test but concluded that a reasonable observer would not attribute the religious message conveyed by the cross to the State. *Id.* at 2451. Justice Stevens dissented, concluding that a reasonable observer would normally assume that the placement of a symbol of religious character before a seat of government would convey a message of state sponsorship. *Id.* at 2464. Justice Ginsburg also dissented, determining that the display of the cross would have carried a message of endorsement by the State. *Id.* at 2474.

Justice Scalia, writing for the plurality, distinguished *Allegheny County* and *Lynch* by stating:

> In *Allegheny County* we held that the display of a privately-sponsored crèche on the "Grand Staircase" of the Allegheny County Courthouse violated the Establishment Clause. That staircase was not,

> however, open to all on an equal basis, so the County was favoring sectarian religious expression. We expressly distinguished that site from the kind of public forum at issue here, and made clear that if the staircase were available to all on the same terms, "the presence of the crèche in that location for over six weeks would then not serve to associate the government with the crèche." In *Lynch* we held that a city's display of a crèche did not violate the Establishment Clause because, in context, the display did not endorse religion. The opinion does assume . . . that the government's use of religious symbols is unconstitutional if it effectively endorses sectarian religious belief. But the case neither holds nor even remotely assumes that the government's neutral treatment of private religious expression can be unconstitutional.

Id. at 2448 (citations omitted).

Although the plurality refused to apply the endorsement test to the privately-sponsored cross display in *Capitol Square*, it acknowledged that the endorsement test would be properly employed to test the constitutionality of government speech. *Id.* at 2448-49. Writing for the plurality, Justice Scalia noted, "[w]here we have tested for endorsement of religion, the subject of the test was . . . expression *by the government itself* . . . ." *Id.* at 2447 (citation omitted). Thus, *Capitol Square* indicates that at least a majority of the Court would apply an endorsement test to determine the constitutionality of a government-sponsored religious display on government property.

In light of the Supreme Court's decisions in *Allegheny County* and *Capitol Square*, we conclude that the endorsement test is the proper analysis to apply to Jersey City's display of

religious symbols on city property.[6] Under the facts of this case, we need not reach the question debated by the members of the Court in *Capitol Square* of whether the endorsement test should be limited in application to government speech, because the religious symbols at issue here are owned and displayed by the city government on city government property.[7]

III.

The Original Display

A. *Government Erection of a Crèche*

Under the endorsement test, a display violates the Establishment Clause if, in its particular setting, the display is "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by non-adherents as a disapproval of their individual religious choices." *Allegheny County*, 492 U.S. at 597. In applying the endorsement test to Jersey City's display, we must consider the particular effects of its display of a crèche.

One of the principles that emerges from the shifting

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[6]Again, it is not our intention to depart from this Court's recent pronouncement in *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471, 1484 (3d Cir. 1996) (in banc), that "*Lemon* remains the law of the land" as the governing test for Establishment Clause cases. Rather, we merely reiterate that in Establishment Clause challenges to *religious displays*, the Supreme Court has emphasized that the endorsement test -- a refinement of the "effects" prong of *Lemon* -- should be the focus of our analysis.

[7]We do not mean to imply, however, that a display identical to the one presented by Jersey City (if privately sponsored) would necessarily withstand constitutional scrutiny. Rather, we merely point out that the display at issue here does not fall within the so-called exception to the endorsement test put forth by the plurality in *Capitol Square*. *See Capitol Square*, 115 S. Ct. at 2451 (O'Connor, J., concurring).

pluralities of *Allegheny County* is that government erection of a crèche creates an inherent risk of perceived endorsement. The crèche, which depicts the event that lies at the very core of Christianity, is an unambiguous religious symbol.[8] Indeed, Justice O'Connor in *Allegheny County* recognized that a crèche is "the central religious symbol of the Christmas holiday." *Id.* at 627.

A crèche represents the Christian belief that Jesus was born to the Virgin Mary to lead humankind on a path toward salvation and redemption. Yet Jersey City would have us believe that the symbol of the crèche has achieved such a level of secular status that it is religiously benign. We are not so persuaded. The mere fact that a religious symbol is pervasively displayed during the holiday season does not diminish its religious significance. A crèche unambiguously represents a belief that is not universally shared by the citizens of this country. In fact, many citizens believe that Jesus may only be understood as a Hebrew prophet. For some devout observers of their respective faiths, it is heresy to ascribe a divine character or purpose to Jesus' life or death. Indeed, as Justice Brennan recognized in his dissent in *Lynch*, "[F]or Christians, that path [toward salvation and redemption] is exclusive, precious, and holy. But for those who do not share these beliefs, the symbolic reenactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith." *Lynch*, 465 U.S. at 708 (Brennan, J., dissenting).

When government chooses to speak by erecting a crèche

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[8]One commentator suggests that the Supreme Court's decisions in the display cases are guided by their view of the messages conveyed by particular religious symbols and whether these symbols are "pure" or "ambiguous." Calvin R. Massey, *Pure Symbols and the First Amendment*, 17 Hastings Const. L.Q. 369, 379-82 (1990).

on government property, the principles at the core of the Establishment Clause are clearly implicated. *See Capitol Square*, 115 S. Ct. at 2448 ("In *Allegheny County*, we held that the display of a privately-sponsored crèche on the `Grand Staircase' of the Allegheny County Courthouse violated the Establishment Clause. That staircase was not, however, open to all on an equal basis, so the County was favoring sectarian religious expression."). By erecting a crèche itself, on city property, a city sends a stronger message of endorsement of religion than when it merely provides a forum for private religious speech. In the former context, the government is effectively conveying the message that "we celebrate the holiday season by recognizing the birth of Christ." As Justice O'Connor noted in *Allegheny County*, "[T]he display of religious symbols in public areas of core government buildings runs a special risk of making religion relevant, in reality or in public perception, to status in the political community." *Allegheny County*, 492 U.S. at 626 (O'Connor, J., concurring). Accordingly, we conclude that Jersey City's display of a crèche on City Hall Plaza -- the very seat of Jersey City government -- conveyed a message of religious endorsement.

Further, we note that the expenditure of public funds to erect and maintain a religious display directly implicates the Establishment Clause. Jersey City's display was erected and maintained with public funds. If a city taxpayer objected to the religious display, he or she could not have opted out of contribution to the display, even if fundamentally repugnant to his or her own beliefs. Of course, taxpayers often exercise little control over how the government spends its money on a daily basis, but the Establishment Clause presents unique constraints on the expenditure of public funds for religious purposes.[9]

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[9]In recognition of these constraints, the Supreme Court has (continued...)

Most importantly, the Establishment Clause requires the government to remain neutral towards religion in its expenditure of public funds.

Here, Jersey City expressed a religious preference by erecting a religious display through the expenditure of taxpayer dollars.[10] Moreover, by using taxpayer dollars to fund a display containing religious symbols, Jersey City has increased the risk that the display's religious message will be attributed to the city and its taxpayers. In other words, Jersey City's use of public funds to erect and maintain its display increased the "risk of making religion relevant . . . to status in [Jersey City's] political community." *Allegheny County*, 492 U.S. at 626 (O'Connor, J., concurring).

Jersey City's display of a crèche was accompanied by a menorah, a sign, and a Christmas Tree. Jersey City maintains that this context alters the message of endorsement conveyed by the display of the crèche. We disagree. The menorah is a religious symbol. And when displayed with a crèche, the menorah's religious significance is emphasized. Moreover, the token inclusion of the Christmas tree does little to mitigate the religious message of the crèche and the menorah. Thus, the display cannot be viewed as anything but a constitutionally impermissible dual endorsement of Christianity and Judaism.

Read together, *Lynch*, *Allegheny County*, and *Capitol*

(...continued)
acknowledged taxpayer standing in the Establishment Clause context, while rejecting taxpayer standing in others. *See Flast v. Cohen*, 392 U.S. 83 (1968).

[10]For an interesting discussion of the Establishment Clause implications of using taxpayer dollars to fund religious displays, see generally Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* (1995).

Square emphasize the importance of perceived government endorsement of religion in Establishment Clause analysis. A comparison of Jersey City's display with the displays involved in *Allegheny County* and *Lynch* reinforces the conclusion that Jersey City's original display impermissibly endorsed religion. In *Allegheny County*, a privately-owned nativity scene was displayed on the main staircase of the county courthouse, bounded by a wooden fence, poinsettias, and a plaque stating "This Display Donated by the Holy Name Society." *Allegheny County*, 492 U.S. at 580. Thus, even with a sign proclaiming private ownership of the display, the Court held that the display, in its context (on the grand staircase of the Allegheny County Courthouse), communicated state endorsement of religion. In *Lynch*, the government-owned and maintained crèche was part of a "winter wonderland" display and was situated in a privately-owned park not located near any visible seat of government. Because there were no external indicia of government sponsorship of the crèche, the risk of perceived endorsement was significantly lessened. And in *Capitol Square*, the Court upheld the constitutionality of the display of a privately-sponsored cross in a public square because the government was not "sponsoring" the speech.

In this case, Jersey City not only owned and maintained the crèche but chose to erect it on City Hall Plaza -- the very seat of Jersey City government. Moreover, the sign that accompanied the display proudly proclaimed that the display was sponsored by Jersey City. Like the crèche in *Allegheny County*, the crèche and the menorah were located prominently at the visible seat of government power. The City placed the display such that all visitors to City Hall were confronted with prominent religious symbols. The Establishment Clause prohibits the government, when speaking, from expressing favoritism towards a particular religion. By using the City Hall Plaza as a forum from which to communicate its endorsement of Christianity and Judaism, Jersey City violated the

Establishment Clause.[11]

B. *The City's Diversity/Pluralism Justification*

The City maintains that its celebration of many different religions throughout the year should be considered the "context" in which the crèche and the menorah should be viewed, effectively converting its religious displays from "endorsement of religion" into a "celebration of diversity."

There are three reasons why the City's diversity/pluralism justification fails to pass constitutional muster. First, notwithstanding Justice O'Connor's recognition of the values of religious pluralism in *Allegheny County*, government endorsement of one or any number of different religions is unconstitutional. Second, a reasonable observer cannot be presumed to be aware of the various religious and cultural celebrations that take place throughout the year in Jersey City. Third, the City's policy of celebrating many different religions, while perhaps laudable, is a classic example of government entanglement with religion. We will discuss each of these points in detail below.

(1) Endorsement of More Than One Religion

The City, in support of its diversity/pluralism justification, relies on the following language from Justice O'Connor's concurrence in *Allegheny County*:

> By accompanying its display of a Christmas tree -- a secular symbol of the Christmas holiday season --

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[11]The ACLU also challenged the constitutionality of the display under the New Jersey Constitution. In interpreting the New Jersey Establishment Clause, New Jersey courts have relied on Federal Establishment Clause jurisprudence. *See Ran-Dav's County Kosher, Inc. v. State*, 608 A.2d 1353, 1358 (N.J. 1992). Thus, we need not consider separately whether the displays are consistent with the New Jersey Constitution.

> with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of the year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season.
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> * * *
>
> A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens. In short, in the holiday context, this combined display in its particular physical setting conveys neither an endorsement of Judaism or Christianity nor disapproval of alternative beliefs, and thus does not have the impermissible effect of "mak[ing] religion relevant, in reality or public perception, to status in the political community."

Allegheny County, 492 U.S. at 635-36 (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). The City maintains that *Allegheny County* stands for the proposition that government celebration of different religions is not in fact "endorsement" of religion that runs afoul of the Establishment Clause.

The City misreads Justice O'Connor's emphasis on pluralism and diversity. The menorah in *Allegheny County*, while viewed by Justice O'Connor as a religious symbol, was placed next to a Christmas Tree, which the Court (including Justice O'Connor) considered a secular symbol. Thus, Justice O'Connor concluded that the display, in context, endorsed neither Judaism or Christianity. The secular nature of the Christmas tree, concluded Justice O'Connor, converted the

display into a celebration of diversity and pluralism and distinguished it from an endorsement of religion.

But it is important to note that Justice O'Connor's pluralism/diversity justification for the menorah and Christmas tree display in *Allegheny County* was not based on the fact that two different religions were represented in a display. She emphasized that the Christmas tree created a secular context emphasizing diversity and pluralism. It remains clear that government celebration of one particular religion, or even more than one religion, can constitute government endorsement of religion that violates the Establishment Clause by "sending a clear message to nonadherents that they are outsiders or less than full members of the political community." *Allegheny County*, 492 U.S. at 627 (O'Connor, J., concurring). We do not suggest that all government celebrations of diverse cultures need be free of all religious content. Indeed, such celebrations would likely be impossible given religion's inherent role in many different cultures. We merely recognize that government celebration of more than one religion cannot magically transform a government endorsement of religion into a secular "celebration of diversity and pluralism."

(2) The Perspective of the "Reasonable Observer"

The City argues that the reasonable, informed observer of the original Jersey City display should be presumed to be aware of the City's year-round celebration of different cultures and religions. According to the City, it should be apparent to such an informed observer that the display is a celebration of culture and not an endorsement of religion.

In discerning here the viewpoint of the "reasonable observer" we are asked to consider whether the observer is aware of the "history and context" of the challenged

government activity.[12] Justice O'Connor, for one, has not hesitated to impute a significant amount of knowledge of "history and context" to the reasonable observer. *See Capitol Square*, 115 S. Ct. at 2455 (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

Justice Stevens, in contrast, has rejected Justice O'Connor's "ideal" reasonable observer, finding her conception to be more akin to a "well-schooled jurist" than a mere reasonable observer. *Capitol Square*, 115 S. Ct. at 2466 n.5 (Stevens, J., dissenting). Explicitly rejecting the assumption that reasonable viewers are aware of the history of the public forum at issue, Justice Stevens noted that Justice O'Connor "apparently would not extend Establishment Clause protection to passers by who are unaware of Capitol Square's history." *Id.* at 2470 n.14.

Moreover, several courts of appeal have refused to allow

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[12]Although we agree with the City that the endorsement test necessarily focuses on the perception of some formulation of a "reasonable observer," we note the nearly impossible task of giving content to the hypothetical reasonable observer in our multicultural society. In his dissent in *Allegheny County*, Justice Brennan identified the risk of subjective construction of the viewpoint of the "reasonable observer":

> I shudder to think that the only "reasonable observer" is one who shares the particular views on perspective, spacing, and accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.

Allegheny County, 492 U.S. at 573 (Brennan, J., dissenting).

Indeed, in *Capitol Square* the concurring and dissenting Justices struggled over the definition of "reasonable observer," disagreeing over just *how* informed a reasonable observer needed to be. *See* Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 Conn. L. Rev. 243, 252-53 (1996).

the "history and context" of a practice to trump an otherwise clear endorsement of religion that would be apparent to a so-called reasonable observer. *See Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995) ("[A]n appeal to history . . . is indeed an argument which could always `trump' the Establishment Clause, because of the undeniable significance of religion and religious symbols in the history of many of our communities."); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525-26 (9th Cir. 1993) (refusing to consider the "historical significance" of a municipality's display of a cross in a city park); *Harris v. City of Zion*, 927 F.2d 1401, 1415 (7th Cir. 1991), *cert. denied*, 505 U.S. 1229 (1992) (striking a city seal containing Christian symbols and concluding that "[n]o appeal to history can abate [a sectarian] message when the images in the seal are abstract symbols of a particular Christian sect").

We agree with Justice Stevens that assuming the reasonable observer is aware of "history and context" when viewing a municipality's religious display is "a highly unlikely supposition." *Capitol Square*, 115 S. Ct. at 2470 (Stevens, J., dissenting). In our view, when testing for endorsement, we must take into account the perspective of those citizens within the community who hold minority religious views.[13]

Thus, we cannot agree that an observer of the display who is a new resident to Jersey City, has no understanding of the history of the community, but has a strong sense of his or her own faith, a faith not depicted in the display, is somehow less "reasonable" an observer than the Christian or Jewish observer who has lived in Jersey City for twenty years. It follows that

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[13]For further discussion of this point, see Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 8 Sup. Ct. Rev. 323, 374 (1995) (noting that the reasonable observer "should have only an ordinary amount of knowledge of the law and of the history of symbols in public places").

this new resident of Jersey City should be entitled to no less Establishment Clause protection than a long-time resident.

Accordingly, we conclude that the reasonable observer of Jersey City's display cannot be presumed to have knowledge of Jersey City's different cultural and religious celebrations. The City argues that the "reasonable observer" sees a "time lapse photograph" depicting Jersey City's various celebrations. This is a view that departs from reality. A reasonable observer of Jersey City's display stands before City Hall, flanked by two religious symbols: the crèche and the menorah. There are no other visual components, other than the sign proclaiming the City's celebration of diversity, that can give the observer the "time-lapse photograph" effect.[14] A general awareness of the City's celebration of diversity throughout the year is obscured by the physical presence of the symbols of Christianity and Judaism before City Hall.

(3) Entanglement

The City also argues that its erection of the crèche and the menorah are part of an overall plan to celebrate different religions and cultures. This argument must also fail. Put simply, Jersey City has pursued a quintessential type of government action that "fosters an excessive entanglement with religion." *Lemon v. Kurtzman*, 430 U.S. 602, 613 (1971).

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[14]Counsel for the City rely heavily on the "secularizing" power of the sign accompanying the display. Again, the sign read, "[t]hrough this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples." *See* City Br. 17; City Reply Br. 11; Oral Arg. Tr. 20, 22, 58, 63, 66. The Supreme Court has recognized, however, that "no sign can disclaim an overwhelming message of endorsement." *Allegheny County*, 492 U.S. at 619. We conclude, therefore, that the sign cannot "secularize" the display, or dilute its message of endorsement, merely because it conveys to the reasonable observer that the City engages in year-round celebrations of different cultures and religions.

In *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court reaffirmed the continuing vitality of the "excessive entanglement" prong of the *Lemon* test. *Aguilar* involved a challenge to New York City's provision of funding for public school instructors who taught remedial classes to private school students in private school classrooms. An overwhelming majority of the participating private schools were religiously affiliated. New York City adopted a supervisory system designed to monitor the classes to ensure that public funds were not used to inculcate religious beliefs. In holding that New York City's program violated the Establishment Clause, the Court stated:

> This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes. *In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a "religious symbol" and thus off limits in a Title I classroom.* In short, the religious school, which has a primary purpose of the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.

Id. at 413 (citation omitted) (emphasis added).

Even if we were to conclude that the City could avoid the "endorsement" of religion by implementing its plan to celebrate many different religions and cultures, it could not avoid an excessive entanglement with religion in the implementation.

Such a plan would necessitate judgments regarding which religious and cultural holidays to celebrate, which religious and cultural symbols appropriately conveyed the proper non-sectarian message, and decisions regarding the relative importance and cultural components of different religions. In carrying out this plan, Jersey City Mayor Schundler would have to address significant questions regarding specific religions: Should a rabbi and a priest be consulted when erecting the menorah and the crèche? Should a ceremony accompany the erection of these religious symbols? Should the City employ a Muslim cleric during Ramadan Observance Month to avoid offending a theological protocol of Islam?[15]

Another troubling aspect of entanglement pinpointed by the Court in *Aguilar* is the very proper and legitimate concern that governmental involvement in such decisions will alienate certain members of the political community. The Court commented that:

> The numerous judgments that must be made by agents of the city concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the

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[15]Our analysis does not require consideration of the motives of Mayor Schundler himself. Our concern runs deeper and is focused on the dangers associated with placing the power to make religious judgments in the hands of government officials. On this point, we remain guided by Justice Black, who wrote:

> The Establishment Clause thus stands as an expression of the principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate.

Engel v. Vitale, 370 U.S. 421, 432 (1962).

> dangers of political divisiveness along religious lines increase.

Aguilar, 473 U.S. at 414.

Jersey City, in implementing its plan to celebrate the diversity and pluralism of various religions and cultures, would obviously encounter the types of decisions that would produce political divisiveness. Many adherents of religions other than Christianity and Judaism would likely feel politically alienated if the City were unwilling to erect a display commemorating their particular religion. Moreover, the City's continuing role in deciding how to celebrate various religions will be, in reality, inevitably guided by politics. For example, it would be unlikely that Mayor Schundler (or any other head of a municipality) would erect a display that would offend a majority of his constituents.[16] That such a political calculation is possible confirms that these types of religious judgments should not be placed in the hands of an elected official.

Thus, we conclude that the City's plan to celebrate many different religions and cultures would amount to a constitutionally impermissible entanglement of government and religion.

IV.

The Second Display (adding Santa, Frosty, and the Red Sled)

The district court, in its December 21, 1995 order, permitted Jersey City's display of a crèche, a menorah, Frosty

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[16]Justice Powell identified this as a concern in his concurrence in *Aguilar*, commenting that "[i]n States . . . that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools." *Aguilar*, 473 U.S. at 416 (Powell, J., concurring).

the Snowman, Santa, and a red sled. As we noted earlier, the district court stated:

> I conclude that by making these additions defendants have sufficiently demystified the [holy], they have sufficiently desanctified sacred symbols, and they have sufficiently deconsecrated the sacred to escape the confines of the injunctive order in this case.

Tr. at 12. The district court modified its November 28 order by requiring Jersey City to maintain the additional secular figures (Frosty and Santa) in the display. If Frosty, Santa, and/or the sled were stolen or destroyed, they were to be replaced within twenty-four hours.

Without opinion, the district court apparently determined that the presence of Frosty, Santa, and a sled cleansed the display of its sectarian qualities. In so holding, the district court summarily concluded that the modified display was constitutional under *Lynch* and *Allegheny County*. *ACLU of N.J. v. Schundler*, No. 95-206 (D.N.J. Dec. 21, 1995) (order denying preliminary injunction).

This summary conclusion is particularly troubling given the Supreme Court's emphasis in *Lynch* and *Allegheny County* on the importance of analyzing the specific context of the challenged display. The district court offered no assessment of the demystifying powers of Frosty the Snowman or Santa Claus, or even the sled. That is, the court did not explain how the context of the second display "demystified" the impermissible religious content (the crèche and menorah) of the original display. Moreover, we are puzzled as to the origin of the district court's "demystification" (or "desanctification") analysis. Under *Allegheny County*, the relevant analysis focuses on whether the content and context of the display would convey a message of government endorsement of religion. While true that the Court in *Allegheny County* found the

menorah and Christmas tree display to convey a secular message, the Court has never suggested that the demystification powers of certain secular figures could diminish the religious message conveyed by sectarian symbols.[17] As such, we conclude that the district court erred in determining that the constitutionality of the modified display depended on whether the presence of Frosty and Santa "demystified" the crèche and the menorah.[18]

We also note that, in our view, *Allegheny County* does not compel the result reached by the district court. *Allegheny County* did not create a per se rule that a "secular" symbol placed next to a "religious" symbol is constitutional. The content of the *Allegheny County* display was arguably secular. While Justice O'Connor recognized that the menorah is a religious symbol, she also recognized that a depiction of a Christmas tree and a menorah may invoke an image of different individuals celebrating the holidays at the end of the calendar year. *Allegheny County*, 492 U.S. at 635 (O'Connor, J., concurring). This time of year is, at least in this country, widely regarded as "the holiday season." Thus, Justice O'Connor recognized that a Christmas tree and a menorah, in the context they were presented in *Allegheny County*, endorsed

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[17]If adopted, the district court's "demystification" approach would lead federal courts and municipal officials to engage in an ad hoc, arbitrary, constitutional guessing game over the relative secularizing "power" of individual symbols. For example, a city mayor would be forced to decide whether the addition of a plastic candy cane would be enough to bring a crèche display in compliance with the Establishment Clause, or whether he or she would also need to add a string of lights. As a practical matter, we find it unlikely that these difficult questions of constitutional magnitude can be solved by a plastic Santa or Frosty.

[18]We note that both the ACLU and the City agree that the district court's "demystification" approach was flawed. ACLU Br. at 38; City Br. at 15.

only a secular recognition of the holiday season. *Id.* at 635-36.

Government display of a crèche, on the other hand, cannot convey a meaning separate from the very act it is meant to portray. A crèche depicts the Birth of Christ, the event that lies at the foundation of Christianity. In *Allegheny County*, the Court determined that displays containing a crèche as a primary focal point, which are situated at the seat of government, are constitutionally impermissible as they convey a message of government endorsement. This is consistent with *Lynch*, in which the Court permitted a crèche that was part of a display in a private park depicting a "winter wonderland" scene because, in context, there were no external indicia of government endorsement.

As we have discussed, the Supreme Court, in its myriad of approaches in the display cases, has repeatedly emphasized the importance of examining the context of the display at issue to determine whether it has the effect of endorsing religion. In *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, we discussed *Allegheny County* and *Lynch* to illustrate "the importance of the context of a challenged practice" in conducting an Establishment Clause analysis. *ACLU of N.J. v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1484 (3d Cir. 1996). The context of Jersey City's second display is as follows: on one side, a large menorah stands about ten feet from a four-foot plastic Santa and a Christmas tree decorated with lights and Kwanzaa symbols; on the other side, the characters of the crèche are huddled off to the side of a manger, with Frosty in the background bearing witness and separated from the crèche by a red sled. The token additions of the secular symbols do little to alter the "context" or the focal points of the City's display. We reiterate that Jersey City's display of the crèche at the seat of City government power impermissibly conveyed a message of government endorsement

of religion. And, in our view, the City's addition of Santa, Frosty, and a red sled did little to secularize that message.[19]

The difficulty presented by the district court's hypertechnical Establishment Clause analysis is exacerbated by its requirement in the injunction that Santa, Frosty, and the sled were to be replaced within twenty-four hours if any of them were removed from the display. Apparently, the district court found the constitutional "demystification" powers of Frosty, Santa, and the sled to be so great that their absence for one day would transform the display back into a government endorsement of religion. This reinforces the plain fact that the district court was convinced that the presence of two, four-foot plastic figurines of Frosty and Santa, along with a red wooden sled, "demystified" the religious message conveyed by the City's erection of a display commemorating the Birth of Christ and the Miracle of the Oils. We conclude that this simply cannot form the basis of sound constitutional analysis.

V.

Accordingly, we hold that the City of Jersey City's display of a crèche and a menorah on the lawn in front of its City Plaza

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[19]The ACLU, in its brief, artfully addresses the district court's Establishment Clause analysis by stating that:

> [A]t most, a reasonable observer would construe [Frosty and Santa] to be background witnesses to the Miracle of the Oils and the Birth of Christ, respectively. However confusing the presence of a snowman in Bethlehem may be from a canonical perspective, a reasonable observer informed of the history and context of religious displays in front of City Hall would invariably characterize them for what they are - attempts at evasion of constitutional prohibitions through superficial secular tokenism.

ACLU Br. at 17.

violated the Establishment Clause. We also hold that the district court erred in modifying the injunction based upon its conclusion that the addition of Frosty, Santa, and a red sled "demystified" the religious meaning of the crèche and the menorah and rendered the display constitutional. As such, we vacate the district court's modified injunction order and remand the case so that the district court can consider, consistent with the standards set forth in this opinion, whether the modified display was constitutional.

McKEE, *Circuit Judge, Concurring.*

I agree with the reasoning of my colleagues and therefore join in their opinion. However, I think it necessary to state that I think that our analysis here should be defined by the parameters of *Allegheny County v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). I do not think that *Capitol Square Review & Advisory Board v. Pinette*, ___ U.S. ___, 115 S. Ct. 2440, 132 L.Ed.2d 650 (1995), assists us.

In *Capitol Square*, a "10-acre, state-owned plaza surrounding the Statehouse" in the capitol city of Ohio had been "used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious" for over a century. *Id.* at 2444. By statute, the square was available for use by "the public . . . for free discussion of public questions, or activities of broad public purpose," and the Capitol Square Review and Advisory Board was given the responsibility for regulating public access. (internal quotations omitted). *Id.* at 2440. That Board rejected a request by Donnie Carr, the local leader of the Klu Klux Klan, to erect a display consisting of an unattended cross, and Carr appealed to the federal courts alleging a violation of the Constitution. In reviewing that decision, the Supreme Court limited itself to the

Establishment Clause issue even though Carr argued that the state's real reason for rejecting the request was its disapproval of the Klan's political views. Thus, the only issue the Court discussed was the state's right to limit private speech on public property that had historically been used as an open public forum.

The Court began its analysis by noting that "[r]espondents' religious display in Capitol Square was private expression." *Id.* at 2446. That expression was clearly entitled to protection regardless of content. "[W]e have not excluded from free-speech protections religious proselytizing. . . ." *Id.* The city defended its rejection of the requested display by arguing that it had an interest in avoiding official endorsement of Christianity under the Establishment Clause. The Court relied in part upon the "endorsement test" and its prior holding in *Allegheny* and *Lynch* to reject that position.

> We find it peculiar to say that government 'promotes' or 'favors' a religious display by giving it the same access to a public forum that all other displays enjoy. . . . And as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.

Id. at 2447. Accordingly, I do not think that *Capitol Square* illuminates our present inquiry. Our analysis does not involve private speech. Rather, here, the City itself owned and erected the display at issue.

Nevertheless, as the majority quite correctly points out, *Lynch* and *Allegheny* require the result we reach here today. Furthermore, as my colleagues note, in *Lemon*, the Supreme Court held that the Establishment Clause requires that state action 1) have a secular purpose; 2) have a primary effect that neither advances nor inhibits religion; and 3) avoid excessive

government entanglement with religion. *Lemon*, 403 U.S. 612-13. I think my colleagues' analysis of *Lynch* and *Allegheny* establishes that the first display is inconsistent with the prohibitions of *Lemon* and properly remands to determine the legality of the second display. Accordingly, I join the opinion with the reservations noted herein.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, and ANN SORREL, Plaintiffs, v. BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, New Jersey, the CITY COUNCIL OF JERSEY CITY, and the CITY OF JERSEY CITY, NEW JERSEY, Defendants.	Civ. No. 95-206(DRD) **OPINION**

[Filed November 28, 1995]

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DEBEVOISE, *Senior District Judge.*

Plaintiffs, the American Civil Liberties Union of New Jersey ("ACLU"), and four residents of the City of Jersey City instituted this action against defendants, the City of Jersey City and its Mayor and Council, seeking, among other things, to preliminary and permanently enjoin Defendants from erecting a creche and menorah at the front entrance of City Hall. Plaintiffs move for summary judgment on their complaint and for an Order that (1) permanently enjoins the Defendants from erecting or sponsoring religious displays on property owned by the City of Jersey City; and (2) declares that the display of a creche and menorah in front of Jersey City Hall violates the First Amendment of the United States Constitution and correlative sections of the New Jersey Constitution. Defendants cross-move for summary judgment in their favor on all counts of the complaint. For the reasons set forth below, Plaintiffs' and Defendants' motions are granted in part and denied in part.

BACKGROUND

The following facts are undisputed and are taken from the parties' papers.

Since at least the 1965 holiday season, the City of Jersey City (the "City") has displayed a creche and menorah on the lawn and plaza area in front of its City Hall. The City Hall Plaza is land that is owned by the City. In addition, the creche and menorah are owned, maintained, and stored by the City. Since the beginning of his term as Mayor, the religious displays have been erected and displayed at the direction of Jersey City Mayor Bret Schundler and the City Council.

The creche is displayed on the days immediately preceding and following Christmas. The scene depicts the traditional Christian imagery of the Three Wisemen, Joseph, Mary, and the Baby Jesus. The replicas of Mary and Joseph are placed inside of a small manger, while the Three Wisemen are placed a few feet away. It is erected on the right side of City Hall as one faces the main entrance. It is approximately twelve feet long by eight feet wide, surrounded and framed by a post-rail. Although usually displayed near a menorah,[1] no other traditional secular symbols of Christmas are displayed near the creche.

The menorah is displayed during Hanukkah on the left side of City Hall Plaza. As with the display of the creche, the display of the menorah does not include any secular symbols of the holiday season.

During the 1994 holiday season, all the individual plaintiffs encountered these displays. Three of the plaintiffs, Joel Solow, Ann Sorrel, and Robert Lander, as Jersey City residents, property owners, and taxpayers, viewed these displays as they travelled past City Hall or visited City Hall to conduct official or private business.

On or about December 13, 1994, the American Civil

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[1]Because Hanukkah occurred early during the 1994 holiday season, the displays of the menorah and creche did not overlap.

Liberties Union of New Jersey ("ACLU") sent a letter to Mayor Schundler informing him of complaints that it had received regarding the displays and asking the Mayor to reevaluate the "practice of displaying these religious symbols on public property." On or about December 16, 1994, The Becket Fund for Religious Liberty sent a response to the ACLU. That letter informed that ACLU that the City would post a sign describing the City's position regarding cultural displays as follows:

> All cultural displays throughout the year, beginning with this creche, will be accompanied by a sign that reads: "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples."

A new sign containing the quoted language appeared in front of City Hall on December 16, 1994.

Plaintiffs brought this suit to, *inter alia*, enjoin the Defendants from erecting similar displays during the upcoming holiday season and all future holiday seasons.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

574, 586-87 (1986), *rev'g*, 723 F.2d 238 (3d Cir. 1983). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Sound Ship Bldg. Co. v. Bethlehem Steel Co.*, 533 F.2d 96, 99 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The mere existence of some alleged factual dispute between the parties, however, will not otherwise defeat a properly supported motion for summary judgment. *Id.* at 247-248.

ANALYSIS

Plaintiffs argue that the creche and menorah are religious symbols and that the City's practice of displaying these religious symbols violates the Establishment Clause of the United States Constitution, in addition to the Equal Protection Clause and various New Jersey Constitutional provisions.

Defendants assert that the City celebrates its diversity through a wide variety of official proclamations, city-sponsored events, and seasonal public displays. The City further states that because religion is often an integral part of culture, many of the City's various cultural activities include religious elements. It is in keeping with these cultural efforts that the City displays a menorah and creche in front of City Hall each holiday season.

I. *Plaintiffs' Establishment Clause Claim*

In an effort to support the enthusiasm of the holiday season, a government entity must be careful not to step over the constitutional bounds of the Establishment Clause of the United States Constitution. The Establishment Clause of the First

Amendment provides: "Congress shall make no law respecting the establishment of religion . . . ." U.S. Const. amend. I. The First Amendment is applicable to the states through the Fourteenth Amendment. *Everson v. Board of Ed.*, 330 U.S. 1 (1947).

The seminal case in determining whether a government practice violates the Establishment Clause is *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In that decision, the Supreme Court described a three-part test to be used in determining whether a government practice violates the Establishment Clause. The practice (1) must have a secular purpose; (2) must neither advance nor inhibit religion in its principal or primary effect; and (3) must not foster an excessive entanglement with religion.[2] *Id.* at 612-13.

In the instant case, Defendants assert, and Plaintiffs do not dispute, that the displays have a secular purpose. Defendants state that in keeping with the City's efforts to celebrate its cultural diversity, the City displays the menorah and creche in front of City Hall. Plaintiffs have not submitted any evidence to refute this stated purpose. Thus, the displays in question have a secular purpose.

The parties also do not discuss in their briefs whether the displays foster an excessive entanglement with religion. For a court to find excessive entanglement, the government practice does not have to cause it to monitor sectarian activities, which was at issue in *Lemon*. Obviously, that is not a concern here. However, another form of excessive entanglement is instigation

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[2]Although in *Lemon* the Supreme Court stated that this test had been developed to determine whether a *statute* violated the Establishment Clause, courts, including the Supreme Court, have used it when analyzing government practices alleged to violate the Establishment Clause. *See, e.g., County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

of divisiveness among and between religious groups. *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 931-32 (3d Cir. 1980) (affirming district court's conclusion that city's payment for items in connection with Pope's visit violated the First Amendment), *cert. denied*, 451 U.S. 987 (1981); see also *May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983) (holding "moment of silence" legislation unconstitutional as violating the Establishment Clause), *aff'd*, 780 F.2d 240 (3d. Cir. 1985). However, as stated above, the parties have not addressed this issue in these motions, and the Court does not have sufficient information to determine whether the City's practice fosters an excessive entanglement of religion by monitoring sectarian activities or promoting political divisiveness.

The last inquiry under the *Lemon* test is whether the primary effect of government practice is to advance or inhibit religion. The Supreme Court stated in *Allegheny County*:

> Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion, a concern that has long had a place in our Establishment Clause jurisprudence.

Allegheny County, 492 U.S. at 592.

Thus, in *Allegheny County* the Supreme Court held that the county's display of a creche impermissibly endorsed religion and was therefore unconstitutional. In that case, the Allegheny County government erected a creche on the Grand Staircase of the country courthouse. The display included the traditional figures, as the creche in the instant case does, and at the crest of the display there was an angel bearing a banner that proclaimed "Gloria in Excelsis Deo". The creche was surrounded by a

wooden fence. In addition, the county decorated the creche with red and white poinsettia plants and small evergreen trees with red bows. *Id.* at 580. Interpreting the Supreme Court's holding in *Lynch v. Donnelly*,[3] 465 U.S. 668 (1984), the Court stated that the effect of a creche display turns on its setting. Applying that to the *Allegheny County* display, the Court noted:

> Here, unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message. The *Lynch* display composed a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the creche, and had their specific visual story to tell. Similarly, whatever a "talking" wishing well may be, it obviously was a center of attention separate from the creche. Here, in contrast, the creche stands alone: it is the single element of the display on the Grand Staircase.

Allegheny County, 492 U.S. at 598. The Court further noted:

> The presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the creche. The record demonstrates clearly that the

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[3]In *Lynch*, the Supreme Court examined a creche display and reached the opposite conclusion from the one in *Allegheny County*. In *Lynch*, the City of Pawtucket, Rhode Island, erected a Christmas display in a park owned by a nonprofit organization. The display included a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that read "Seasons Greetings," and a creche. As in the instant case, all components of the Pawtucket display were owned by the city. *Lynch*, 465 U.S. at 671. The Court held that Pawtucket had a secular purpose in erecting the display, the display did not advance religion, and the display did not cause an excessive entanglement of government in religion. *Id.* at 685.

> creche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.

Id. at 598 n.48. Finally, the Court concluded:

> [T]he creche sits on the Grand Staircase, the "main" and "most beautiful part" of the building that is the seat of county government. No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the creche in this particular physical setting," the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message.

Id. at 599-600 (citations omitted).

The *Allegheny* Court also analyzed whether the City of Pittsburgh's display of a menorah violated the Establishment Clause.[4] Outside the city-county building, the City of Pittsburgh displayed a 45 foot Christmas tree, an 18 foot menorah, and a sign with the mayor's named entitled "Salute to Liberty." The sign read: "During this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Allegheny County*, 492 U.S. at 581-82. The Court held that the menorah display did not have the effect of endorsing religion.[5] *Id.* at 620. It stated, "for the purposes of the Establishment Clause, the city's overall display must be

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[4]The plaintiffs in *Allegheny County* did not protest the Christmas tree display that accompanied the menorah.

[5]The Supreme Court, however, did not express an opinion as to whether the menorah display violated the "purpose" or "entanglement" prong of the *Lemon* test. It stated that those issues were not before it.

understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season. *Id.*

Applying these principles to the instant case, Jersey City's display of the creche and menorah violate the Establishment Clause. As in *Allegheny County*, the creche here stands alone without any secular symbols, as were present in *Lynch*, to detract from its obviously religious message.[6] Furthermore, it is displayed at the entrance to City Hall, where "no viewer could reasonably think that it occupies this location without the support and approval of the government." *Allegheny County*, 492 U.S. at 599-600. In fact, Defendants further reinforce that the creche is supported by the government by the sign that accompanies it.

Defendants argue that the historical context of the creche and menorah, along with the other cultural displays that the City sponsors during the year, indicates that these displays do not send the message that the City is endorsing religion. Rather, all the City's displays and events sponsored during the year indicate that the City is promoting the cultural diversity of its residents.

Although the goal of promoting the cultural diversity of its residents is an admirable one, this policy does not dilute the religious message that the creche portrays. As the *Allegheny* Court stated, "Where the government's secular message can be conveyed by two symbols, only one of which carries religious meaning, an observer reasonably might infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith." *Id.* at 618. The

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[6]As discussed *infra*, the menorah in this context cannot be seen as a secular symbol.

City could use one of many secular symbols that celebrate Christmas to promote the cultural diversity of its citizens.

Defendants also argue that given the physical setting of the creche display, the creche does not indicate that the government endorses religion. They assert that the setting of the creche, accompanied by a menorah, a sign proclaiming the City's cultural diversity message, and a Christmas tree, does not indicate that the City is endorsing religion through its display. Defendants misinterpret the Supreme Court's decisions in *Allegheny County* and *Lynch*.

First, as discussed more fully below, the menorah in this display is not a secular symbol. Thus, the menorah does not dilute the religious message of the creche.

Second, although both parties state that the City also erected a Christmas tree, Plaintiffs indicate that the Christmas tree is not near the creche. This assertion is supported by the photographs that Plaintiffs submitted in their appendix. The Court was unable to locate the Christmas tree in any of these photographs. Thus, any dilution of the religious message of the creche that the Christmas tree may have is negated by its distance from the creche. *See Allegheny County*, 492 U.S. at 598 n.48 (stating that secular symbols elsewhere in the county courthouse did not negate the endorsement effect of the creche because the creche was its own display separate from any other exhibits in the courthouse).

Furthermore, a sign alone cannot negate an otherwise obvious religious message. *See Stone v. Graham*, 449 U.S. 39, 41 (1980) (holding that the posting of the Ten Commandments in public schools violated the Establishment Clause notwithstanding an accompanying sign that attempted to state a secular purpose for the display). Therefore, although the sign included with this creche indicates that the City is attempting to promote the cultural diversity of its citizens, the sign alone

cannot overcome the overwhelming message of endorsement that the creche sends. *See Allegheny County*, 492 U.S. at 600 (holding that sign disclosing that creche was owned by a Roman Catholic organization and not the county only further demonstrated that the county was endorsing the religious message).

As to whether the display of the menorah violates the Establishment Clause, I find that it does. For the government's display of a menorah to be constitutionally permissible, the menorah must be accompanied by other items that dilute its religious message. In *Allegheny County*, the Supreme Court concluded that the menorah, although a religious symbol, did not indicated that Pittsburgh endorsed religion because of the physical setting of the menorah. In the display by the city-county building, the menorah was accompanied by a secular symbol, a Christmas tree, which was substantially larger than the menorah and the primary focus of the display. In addition, the display included the sign described above that stated that the display was a "Salute to Liberty."

In the instant matter, the menorah is not accompanied by a secular symbol that dilutes its religious message. Instead, the menorah is accompanied by the creche, and rather than dilute the religious message of the menorah, the creche emphasizes it. Together they indicate that the government endorses the Jewish and Christian holidays. It is exactly this type of message that is prohibited by the Establishment Clause.

II. *Plaintiff's Equal Protection Claim*

In the second count of their complaint, Plaintiffs allege a violation of their right to equal protection. However, in their briefs Plaintiffs do not include an argument to oppose Defendants' motion for summary judgment on this count.

In order to maintain an equal protection claim independent of their Establishment Clause claim, Plaintiffs must establish

that they received different treatment from other similarly situated individuals or groups. *Harris v. City of Philadelphia*, 35 F.3d 840, 850 (3d Cir. 1994). Plaintiffs have not presented any evidence that they were treated differently from other similarly situated groups. Therefore, Defendants' cross-motion for summary judgment on the second count of the complaint is granted.

III. *New Jersey Constitutional Claims*

Plaintiffs also allege three New Jersey Constitutional claims in their complaint. Specifically, Plaintiffs allege that Defendants' actions violated Article 1, Paragraphs 3, 4, and 5 of the New Jersey Constitution. The Article 1, Paragraph 4 claim has merit; the Article 1, Paragraphs 3 and 5 claims do not.

Article 1, Paragraph 4 provides, in pertinent part: "There shall be no establishment of one religious sect in preference to another . . . ." N.J. Const. art. 1, ¶ 4. In interpreting the New Jersey Establishment Clause, New Jersey courts have relied on federal Establishment Clause jurisprudence. *See, e.g. , Ran-Dav's County Kosher, Inc. v. State*, 129 N.J. 141 (1992) (concluding that government practice violated federal and state Establishment Clauses using federal Establishment Clause principles), *cert. denied, National Jewish Comm'n on Law & Public Affairs v. Ran-Dav's County Kosher, Inc.*, 113 S. Ct. 1366 (1993). Therefore, because Defendants' actions violate the federal Establishment Clause, they also violate the New Jersey Constitution.

Article 1, Paragraph 3 provides:

> No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay

> tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.

Plaintiffs argue that Defendants have violated this paragraph in two respects. One, Defendants have "creat[ed] on public property a shrine for the adoration of the faithful" in violation of a person's right not to be compelled to attend any place of worship. Two, because the City owns the creche and menorah, "each and every citizen of Jersey City has therefore, to some degree, been 'obliged to pay . . . taxes for building or repairing [a] . . . place or places of worship.'" (Pl. Br. at 26 (alterations in original).)

The New Jersey courts have not defined the phrase "place or places worship." However, the plain meaning of this phrase does not contemplate the displays erected by the City. In addition, even if the display were considered a place of worship under the New Jersey Constitution, Defendants have not compelled Plaintiffs to attend "a place of worship." Although Plaintiffs may have to pass the display during the course of their travelling by City Hall, this does not rise to the level of compelled attendance. Therefore, Defendants actions do not violate Article 1, paragraph 3 of the New Jersey Constitution.

Article 1, Paragraph 5 of the New Jersey Constitution provides:

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

This paragraph is the New Jersey Constitution's equivalent

to the Equal Protection Clause of the United States Constitution. *See Washington Nat'l Ins. Co. v. Board of Review,* 1 N.J. 545 (1949). Plaintiffs argue:

> The plain meaning of article I, paragraph 5, of the New Jersey Constitution prevents the government from discriminating against its citizens on the basis of religion with respect to any enjoyment of civil rights. The clear endorsement of certain religions over all others and paying homage to those religions while ignoring others ostracizes those citizens that don't identify themselves with either religious group.

(Pl. Br. at 26.) This argument must also fail. As discussed above, Plaintiffs have not demonstrated that they were treated differently than other similarly situated groups. Thus, Defendants have not violated this paragraph of the New Jersey Constitution.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment with respect to Count 1 and Count 3 of the complaint is granted, but denied with respect to the remaining counts. Defendants' cross-motion for summary judgment with respect to Counts 2, 4, 5 of the complaint is granted, but denied with respect to the remaining counts.[7]

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[7]After argument of the cross-motions for summary judgment and prior to the issuance of this opinion, the Court referred the parties to mediation to be conducted by Eric R. Max, Esq., Director of the New Jersey Office of Dispute Settlement. The relevant United States Supreme Court decisions provide guidance as to the manner in which governmental units can erect holiday displays which include creches and menorahs, and it was thought that perhaps with assistance the parties could reach agreement upon an appropriate display in Jersey City. Although mediation was not successful prior to the issuance of this decision, the parties might consider

(continued...)

An appropriate order follows.

/s/ Dickinson R. Debevoise, U.S.S.D.J.

Dated: November 28, 1995

(...continued)
resuming discussions with the mediator.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 95-206

AMERICAN CIVIL LIBERTIES UNION,	:	
Plaintiff,	:	TRANSCRIPT OF
v.	:	PROCEEDINGS
BRET SCHUNDLER, et al.,	:	
Defendants.	:	

Newark, New Jersey
December 18, 1995

BEFORE: HONORABLE DICKINSON R. DEBEVOISE,
SENIOR UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

RONALD K. CHEN,
Rutgers Constitutional Litigation Clinic
Attorneys for the Plaintiff

DANIEL W. SEXTON,
NANCY E. SMITH,
Attorneys for the Defendants

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.
HOWARD A. RAPPAPORT
Official Court Reporter

* * * *

[11] THE COURT: All right, let me rule on it.

I have reviewed the photographs which have been presented by each side and I have reviewed the affidavits which each side has submitted.

Plaintiffs seek to hold defendants in contempt of court for erecting the creche and Menorah described in the complaint in this action in violation of an injunction order entered on November 28, 1995.

It is true that the defendants have installed on city property the creche and the Menorah which have been on display in prior years, and they have also installed along with these religious symbols secular symbols of the holiday - a plastic figure of Santa Claus, a separate Santa sleigh, an evergreen [12] tree with Kwanza symbols and Frosty the Snowman.

I conclude by making these additions defendants have sufficiently demystified the ho[]ly, they have sufficiently desanctified sacred symbols, and they have sufficiently deconcecrated the sacred to escape the confines of the injunctive order in this case.

The new exhibition passes muster under Lynch against Donnelly and County of Allegheny against American Civil Liberties Union, Greater Pittsburgh Chapter. Thus the defendants are not in contempt of the Court order for having erected it.

However, the addition to the display appears to be of such a flimsy construction, and some were so carelessly erected that they are an obvious prey to vandals and the elements. To prevent the gradual or sudden disappearance of the additions to the display and a return to the status quo ante, the injunctive order will be amended to add the following paragraph. Should defendants elect to bring their holiday display into compliance

with standards set forth in United States Supreme Court decisions in Lynch against Donnelly and County of Allegheny against ACLU by erecting other holiday exhibits to accompany the creche and the Menorah, defendants are ordered to maintain in place such other holiday exhibits for as long as the creche and the Menorah are on display, and if during that period any such other holiday exhibits are stolen or destroyed by whatever cause, defendants shall replace them within 24 hours of their theft or destruction.

Thus plaintiffs are requested to present an amended injunctive order containing that provision and an order denying the application for an order of contempt.

I think that many take care of the situation. Good.

Nothing else, I assume, except for preparing the order.

MS. SMITH: So, your Honor, as it stands, the display is constitutional?

THE COURT: I would think it is.

MS. SMITH: Thank you, your Honor.

THE COURT: Yes. See that it stays that way.

MS. SMITH: Very well.

THE COURT: Don't let them disappear.

Okay.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, AND ANN SORREL, Plaintiffs v. BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, New Jersey, the CITY COUNCIL OF JERSEY CITY and the CITY OF JERSEY CITY, NEW JERSEY, Defendants.	Civ. No. 95-206 (DRD)

[Filed November 28, 1995]

This matter having been opened to the Court by Plaintiffs on a motion for summary judgment and by Defendants on a cross-motion for summary judgment, and notice having been given to all parties, in consideration of the papers submitted, for good cause shown, and for the reasons set forth in the Court's opinion of even date,

IT IS, on this 28th day of November 1995,

ORDERED as follows:

1. Plaintiffs' motion for summary judgment with respect to counts 1 and 3 of the complaint is granted and Defendants' cross-motion for summary judgment with respect to these counts is denied.

2. Defendants are permanently enjoined from erecting the creche and menorah display described in the complaint in this action, or any substantially similar scene or display at the front entrance of the City of Jersey City City Hall or on other property owned, maintained, or controlled by the defendants in their official capacities.

3. Defendants' cross-motion for summary judgment with respect to counts 2, 4, and 5 is granted and Plaintiffs' motion for summary judgment with respect to these counts is denied.

/s/ Dickinson R. Debevoise, U.S.S.D.J.

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, et al., *Plaintiffs* -against-	:UNITED STATES DISTRICT :COURT DISTRICT OF NEW :JERSEY :Civ. No. 95-206 (DRD)
BRET SCHUNDLER, CITY COUNCIL OF JERSEY CITY, and CITY OF JERSEY CITY, *Defendants*	:ORDER

[Filed December 21, 1995]

This matter having been opened before the Court by an Order To Show Cause issued upon the application of Ronald K. Chen, Esq., counsel for plaintiffs, and the Court having conducted a hearing on December 18, 1995, in the presence of Mr. Chen and Nancy Smith, Esq., counsel for the defendants, and the Court being fully informed, and for the reasons set forth in the opinion delivered orally by the Court from the bench,

IT IS ON THIS 21ST DAY OF DECEMBER, 1995, HEREBY

ORDERED that plaintiffs' application for a preliminary injunction against further display of the Menorah and Nativity Scene currently erected in front of City Hall of Jersey City be, and the same is hereby, DENIED, and it is further

ORDERED that plaintiffs' application for a judgment that defendants are in civil contempt of this Court's permanent injunction issued November 28, 1995, be, and the same is hereby, DENIED, and it is further

ORDERED that the permanent injunction issued by this Court on November 28, 1995, be, and the same is hereby, AMENDED to include the following additional provision:

> If defendants elect to bring their display into compliance with the legal standards set forth in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), by erecting other holiday exhibits to accompany the Nativity Scene and Menorah, then defendants are ordered to maintain such other exhibits for as long as the Nativity Scene and Menorah are on display, and if during that period such other holiday exhibits are stolen or destroyed by whatever means, defendants shall replace them within twenty-four hours of their theft or destruction.

/s/ Dickinson R. Debevoise, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5865, 95-5866 and 96-5023

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members; ROBERT LANDER; ADAM JACOBS; JOEL SOLOW; and ANN SORREL

vs.

BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, New Jersey; THE CITY COUNCIL OF JERSEY CITY, NEW JERSEY; CITY OF JERSEY CITY, NEW JERSEY

Bret Schundler, the City Council of Jersey City, and the City of Jersey City, New Jersey,
Appellants No. 95-5865 and No. 95-5866

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members; ROBERT LANDER; ADAM JACOBS; JOEL SOLOW; and ANN SORREL
Appellants No. 96-5023

vs.

BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, New Jersey; THE CITY COUNCIL OF JERSEY CITY, NEW JERSEY; CITY OF JERSEY CITY, NEW JERSEY

[Filed February 18, 1997]

Present: Nygaard, Lewis, and McKee, *Circuit Judges*

AMENDED JUDGEMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on August 7, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 22, 1995, be, and the same is hereby vacated and the cause is remanded so that the District Court may consider, consistent with the standards set forth in the opinion of this Court, whether the modified display was constitutional. It is further ordered and adjudged that the judgment of the District Court entered on November 28, 1995, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Bradford Baldus
Chief Deputy Clerk

Dated: February 18, 1997

Certified as a true copy of the Amended Judgment and issued in lieu of a formal Amended mandate on February 18, 1997.

Teste: /s/ Bradford Baldus

Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5865, 95-5866 and 96-5023

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members; ROBERT LANDER; ADAM JACOBS; JOEL SOLOW; and ANN SORREL

vs.

BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, New Jersey; THE CITY COUNCIL OF JERSEY CITY, NEW JERSEY; CITY OF JERSEY CITY, NEW JERSEY

Bret Schundler, the City Council of Jersey City, and the City of Jersey City, New Jersey,
Appellants No. 95-5865 and No. 95-5866

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members; ROBERT LANDER; ADAM JACOBS; JOEL SOLOW; and ANN SORREL
Appellants No. 96-5023

vs.

BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, New Jersey; THE CITY COUNCIL OF JERSEY CITY, NEW JERSEY; CITY OF JERSEY CITY, NEW JERSEY

[Filed January 13, 1997]

Present: Nygaard, Lewis, and McKee, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on August 7, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 22, 1995, be, and the same is hereby vacated and the cause is remanded so that the District Court may consider, consistent with the standards set forth in the opinion of this Court, whether the modified display was constitutional. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Bradford Baldus

Chief Deputy Clerk

Dated: January 13, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, and ANN SORREL,	:	
Plaintiffs,	:	Civil Action No.
v.	:	2:95cv00206 (DRD)
BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, New Jersey, the CITY COUNCIL OF JERSEY CITY, and the CITY OF JERSEY CITY, NEW JERSEY,	:	
Defendants.	:	

STIPULATION OF PARTIES

The parties hereby stipulate to the following facts as evidence in the above-captioned case.[1] Each party retains the right to dispute the legal significance of the stipulated facts, and does not waive any arguments regarding the weight which they should be accorded:

1. Defendant Bret Schundler is the Mayor of Jersey City, New Jersey and its chief executive officer.

2. Defendant City Council of the City of Jersey City is

[1]It is agreed that nothing contained in this stipulation is intended as, or shall be deemed, a waiver of attorney client privilege or the protections afforded by the work product doctrine.

the legislative body of Jersey City, New Jersey.

3. Defendant City of Jersey City is located in Hudson County, New Jersey, and has its principal place of business at 280 Grove Street in Jersey City.

4. City Hall is the central location for local government affairs for Jersey City, and residents and other members of the public may reasonably be expected to visit City Hall to conduct official business.

5. Mayor Bret Schundler is responsible for determining what items are to be displayed on City property.

6. The Mayor's articulated criteria for displays are that they celebrate or commemorate something of ethnic or cultural significance to the residents of Jersey City.

7. The City's articulated display policy is embodied in E.O. S-068, an Executive Order issued by Mayor Schundler dated December 16, 1994, a copy of which is attached as Exhibit "A".

8. The lawn and plaza area between the curb of Grove St. and the front facade of the City Hall building is owned and maintained by Jersey City.

9. Jersey City has displayed a Menorah at the front entrance of City Hall annually since at least 1965. In 1994, the Menorah was displayed from the period of November 28, 1994, to December 6, 1994 on the left side of the plaza as one faces City Hall.

10. Jersey City has displayed a Christmas Nativity scene on the front lawn of City Hall annually since at least 1965. In 1994, the Nativity scene was displayed from December 7, 1994 to January 6, 1995 on the right side of the plaza as one faces City Hall. The Nativity scene, also referred to as a creche, has consisted of a manger scene with figurines representing the

Three Wisemen, Joseph, Mary and the Baby Jesus.

11. Bret Schundler's office caused the Menorah and the Nativity scene to be erected and displayed in front of City Hall.

12. Jersey City owns, maintains, assembles and stores the Menorah and the Nativity Scene.

13. Jersey City is the sole sponsor of the Menorah and the Nativity Scene.

14. After receiving a letter from the ACLU-NJ in which the ACLU-NJ stated that it would take "appropriate action" if the City did not dismantle the Menorah and nativity scene, the Becket Fund for Religious Liberty, counsel for Jersey City, sent a letter by facsimile on December 16, 1994 to ACLU-NJ describing the City's display policy as follows:

All cultural displays throughout the year, beginning with this creche, will be accompanied by a sign that reads:

> "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its peoples."

15. On or about December 15, 1994, a sign containing the text described in Paragraph 14 had been placed with the Nativity scene, and remained there until the display was removed on or about January 6, 1995.

16. Pursuant to the City's articulated display policy, more than 20 signs containing the text described in Paragraph 14 have been produced and made available to City departments which sponsor cultural and ethnic displays. The signs are currently in use at all City events in temporary displays conducted or erected pursuant to the City's articulated display policy. The same message also appears in a City's summer program entitled "Mayor Bret Present Summer in the City 1995" [Exhibit Omitted].

17. At the time of the Menorah display in 1994, neither the Christmas Tree nor the Nativity scene were displayed. Chanukah did not overlap with Christmas in 1994, and therefore the Menorah was displayed prior to the display of the other holiday symbols.

18. A Menorah lighting ceremony took place at City Hall on November 31, 1994.

19. A Christmas tree, approximately 20 feet tall, was displayed opposite the Nativity Scene on the front left side of the lawn as one faces City Hall, where the Menorah had been displayed.

20. A Christmas tree lighting ceremony took place at City Hall on December 14, 1994.

21. Other than the Menorah, the Nativity Scene, and the Christmas trees, the following is a non-exhaustive list of some of the other displays erected on City property in accordance with the articulated display policy since December 1994 (those marked with an asterisk involved unattended displays.):

* Monthly Art Exhibits in the Rotunda at City Hall featuring exhibits such as Jersey City Students in January 1995, African American History Museum Railroad Exhibit in February 1995, Landscape Oils of Dianne Van Cort and African Art of Jeane Greene in March 1995, Hudson Artists in June 1995, Pro Arts Exhibit in July 1995, Art Builders' Mixed Oils Exhibit in August 1995;

Christmas Concerts Series including performances at City Hall on December 16, 19, 20, 21 and 22, 1994;

Martin Luther King, Jr. Program in Council Chambers at City Hall on January 13, 1995;

Martin Luther King Community Service Award Presentation at the Miller Branch Library Auditorium on

January 13, 1995;

Young Artist Reception at the Rotunda at City Hall; Fine Arts Department of Jersey City Hall on January 18, 1995;

Republic of India Day proclaimed at City Hall on January 26, 1995;

Ramadan Remembrance Month proclaimed at City Hall on February 8, 1995;

Tenth Annual Celebration of African American History Month at Public School 39 on February 15, 1995;

African American History Month Celebration in Council Chambers on February 15, 1995;

* Dominican Flag Raising Ceremony/Cultural Program at City Hall on February 18, 1995;

National Patriotism Week proclaimed as February 20 to February 26, 1995, on February 20, 1995 at City Hall;

* Irish Flag Raising Ceremony at City Hall on March 3, 1995;

Saint Patrick's Day Parade on March 12, 1995;

The United Hindu Federation of New Jersey- Second Grand Phagwah Parade on March 13, 1995;

Girl Scout's "Be Your Best" Day proclaimed at City Hall on March 14, 1995;

March proclaimed as Youth Art Month at City Hall on March 20, 1995;

Greek Independence Day proclaimed at City Hall on March 23, 1995;

Women of Action Award Ceremony in Council Chambers at City Hall on March 28, 1995;

Easter Egg Hunt at Pershing Field City Park on April 8,

1995;

Martin Luther King, Jr. Parade and Scholarship Rally on April 9, 1995;

German Exchange Program of St. Peter's Prep in Council Chambers at City Hall on April 12, 1995;

Days of Remembrance of the Holocaust proclaimed at City Hall on April 23, 1995;

May proclaimed as Older Americans Month at City Hall on May 17, 1995;

* Polish Flag Raising Ceremony for Polish Constitution Day at City Hall on May 3, 1995;

Cuban Independence Parade on May 21, 1995;

Hogar Crea Crusade of Faith and Hope Day proclaimed at City Hall on May 20, 1995;

Asian American Civic Association Ribbon Cutting Ceremony at the Spring Ethnic Festival Site on June 13, 1995;

Philippine American Friendship Month proclaimed as June 12, 1995 to July 4, 1995 on June 16, 1995;

* Philippine Flag Raising Ceremony at City Hall on June 17, 1995;

Mayor's Block Parties held on May 30, June 7, and June 21, 1995;

Indo-American Association, Inc. Spring Festival celebration at Martin Luther King High School on June 18, 1995; India Day proclaimed;

Philippine-American Friendship Parade Festival on June 25, 1995;

Gazebo Concert Series in City parks each Wednesday from June to August 30, 1995.

22. The Flag raisings at City Hall consist of the reading of a proclamation and a ceremony in which individuals from the cultural group represented by the flag and a City official appear on the front balcony of City Hall for the raising of the flag. The flag then flies from the front of City Hall.

23. Jersey City owns, maintains and stores the flags used in the flag raising ceremonies.

24. The City cultural displays listed in Paragraph 21 are recent examples of the long historical practice of celebrating the cultural and ethnic diversity of the peoples of Jersey City. Such public, government-sponsored displays arising from the range of cultural and ethnic backgrounds have occurred in Jersey City for over thirty years.

Respectfully submitted,

THE AMERICAN CIVIL LIBERTIES
UNION OF NEW JERSEY
Rutgers Constitutional Litigation Clinic
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By: /s/ Ronald K. Chen

Attorneys for Plaintiffs ACLU-NJ, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, and ANN SORREL

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DATED: September 27, 1995

EXHIBIT A

JERSEY CITY
BRET SCHUNDLER, Mayor
280 Grove Street
Jersey City, New Jersey 07302

(201) 547-5000
Fax (201) 547-4288

E.O. S-068

December 16, 1994

EXECUTIVE ORDER OF THE MAYOR
OF THE
CITY OF JERSEY CITY

REQUIRING DESIGNATED SIGN TO ACCOMPANY
CULTURAL AND ETHNIC HERITAGE DISPLAYS

Pursuant to the authority vested in the Mayor of the City of Jersey City by law, I issue the following Executive Order.

To continue the long historical and unifying practice and tradition of celebrating the rich, cultural and ethnic diversity of City citizens through culturally and ethnically sensitive and responsive displays, events and undertakings in cooperation with diverse community groups and organizations, all City cultural displays will be accompanied by a sign that reads:

> "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its people."

This Order shall take effect immediately.

Very truly yours,

BRET SCHUNDLER, MAYOR

PWM/ph
cc Robert Lombard, Business Administrator
Robert Byrne, City Clerk

BEST AVAILABLE COPY

No. 96-1620

Supreme Court, U.S.
FILED
MAY 12 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, THE CITY COUNCIL OF JERSEY CITY, and THE CITY OF JERSEY CITY, NEW JERSEY,

Petitioners,

—v.—

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, and ANN SORREL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel for Respondents

May 12, 1997

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in finding that government owned Nativity Scene and Menorah displays, erected by order of the mayor on government property in front of the seat of local government power, communicated government endorsement of religion?

2. Did the Court of Appeals err in ordering the District Court to reevaluate the constitutionality of the religious displays at issue, without reference to the perceived "demystifying" and "desanctifying" powers of various secular accompaniments?

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Co-Respondent American Civil Liberties Union of New Jersey is a not-for-profit corporation organized under the laws of the State of New Jersey. It has no parent company or subsidiaries, and is affiliated with the American Civil Liberties Union, Inc., a not-for-profit corporation organized under the laws of the District of Columbia.

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Respondents American Civil Liberties Union of New Jersey, Robert Lander, Adam Jacobs, Joel Solow, and Ann Sorrel respectfully submit this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

COUNTERSTATEMENT OF THE CASE

The relevant predicate facts of this case are essentially undisputed, and can be quickly stated. The City of Jersey City purchased, with public funds, a Nativity Scene, depicting for Christians the birth of the Son of God in the manger in Bethlehem. It also acquired, with public funds, a menorah, commemorating for Jews the Miracle of the Oils during the rededication of the Temple of Jerusalem. (4a-5a). Each year during the holidays of Christmas and Hanukkah respectively, the City erects these displays on the Plaza lawn in front of Jersey City Hall, the seat of local government, accompanied by a Christmas tree and, recently, a sign (5a). The City Hall Plaza lawn is not dedicated for expressive use by the public, and the record does not reveal other instances in which unattended displays, whether public or private, have been permitted on the City Hall Plaza lawn. It is undisputed that these displays are purely government speech. *(Id.)*

After attempts at informal resolution with the City failed, the ACLU of NJ and four individual plaintiffs who reside or work in Jersey City brought suit in the Superior Court of New Jersey on December 21, 1994, seeking injunctive relief based both upon the United States and New Jersey Constitutions. Defendants removed the action to the United States District Court for the District of New Jersey. On cross motions for summary judgment, the District Court on

November 28, 1995, granted summary judgment to plaintiffs ACLU-NJ *et al.*, based both upon the Establishment Clause of the First Amendment to the federal constitution, and Article 1, § 4 of the New Jersey State Constitution ("There shall be no establishment of one religious sect in preference to another. . . .").

Notwithstanding the District Court's injunction against the original displays as violative of the Establishment Clause, in 1995 the City again erected the Nativity Scene and menorah, now accompanied by a four-foot plastic figurine of Santa Claus lashed with wire to a nearby tree, a similar plastic figurine of Frosty the Snowman, and a red sled. Furthermore, a tree was decorated with ornaments said to commemorate Kwanzaa.

On December 18, 1995, the District Court upheld these modified displays, finding that the presence of the secular symbols of Santa, Frosty and the sled "demystified" and "desanctified" the Nativity Scene and the menorah. (57a.) It therefore modified its prior order and permitted the new display with additional figurines. However, since the District Court found that the new additions were "of such flimsy construction, and some were so carelessly erected that they are an obvious prey to vandals and the elements," it further ordered that if any of the demystifying and desanctifying elements should be lost or destroyed, it must be replaced within 24 hours. (57a-58a.)

Mayor Schundler and the City appealed both the original November 28 order and the December 18 order prohibiting the original display. The ACLU and individual plaintiffs cross-appealed the December 18 order. On appeal,

the United States Court of Appeals for the Third Circuit affirmed the District Court's original decision that the City's display of the Nativity Scene and menorah in front of City Hall communicated government endorsement of religion. It vacated the District Court's second modified order, however. Finding that the District Court's "demystification" and "desanctification" tests incorrectly stated applicable law, it remanded the case to the District Court for a further determination as to whether the modified displays were constitutional under the "endorsement test" set forth in its opinion, which in turn rearticulated the tests laid down in *Lynch v. Donnelly*, 465 U.S. 668 (1983); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); and *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995). Jurisdiction over this case therefore returned to the District Court when the mandate of the court of appeals issued, and the trial judge is currently in a position to proceed with further hearings to determine the constitutionality of the modified display.

REASONS FOR DENYING THE PETITION

Petitioners ask the Court to revisit an issue that it has addressed three times in recent years -- the constitutionality of holiday religious displays under the Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668 (1983); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); and *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995). Having laid out in detail the framework by which such religious display cases should be decided by the lower courts, there is no "compelling reason" (Sup. Ct. R. 10) for the Court to accept review on one

of the innumerable factual permutations that fall within that framework.

1. Petitioner's Argument Is Based Heavily on Factual Interpretation.

After considering the testimonial, documentary, and photographic evidence concerning the displays and the City's practices with regard to the Plaza lawn, the Court of Appeals concluded that the original display both communicated government endorsement of religion (24a-29a), and promoted excessive entanglement of government with religion (29a-32a). In so finding, the Third Circuit was merely following the analytical steps required by *Allegheny*. This process is necessarily fact-sensitive. "[T]he endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins." *Allegheny*, 492 U.S. at 629 (O'Connor, J., concurring). This case does not tread anywhere near those margins, however, and there is little purpose to be served in granting review merely to calibrate the Court of Appeals' contextual sensitivity, where it has demonstrated its understanding of "the need to focus on the specific practice in question in its particular physical setting and context in determining whether government has conveyed or attempted to convey a message that religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S. at 637. *See Federal Trade Comm'n v. American Tobacco Co.*, 274 U.S. 543, 544 (1927) (Supreme Court should "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations").

In *Allegheny*, the Court invalidated a privately owned Nativity Scene located on the central steps of a county courthouse. After considering the entire physical context of the display, the Court found that the Nativity Scene communicated government endorsement of religion, despite the presence of nearby secular displays.

> The presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the creche. The record demonstrates clearly that the creche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.

Allegheny, 492 U.S. at 598 n.48. *Allegheny*, of course, also upheld the display of an 18 foot privately owned menorah next to a 45 foot decorated Christmas Tree and a "Salute to Liberty" sign, all located in the entrance arch of the county administration building. After finding that the tree was "clearly the predominant element in the city's display" (*id.* at 617), the Court concluded that the overall impact of the display was secular. As Justice Blackmun himself noted in *Allegheny*, however, "The display of a menorah alone might well have that effect [of endorsement]." *Id.* at 616 n.64. Here, the Court of Appeals concluded that display of a publicly owned menorah which constituted its own focus point, in front of the most visible seat of local government power, and without the presence of another predominant element, led to a different conclusion. These contrasting results merely highlight the highly fact sensitive nature of the inquiry, and the fruitlessness of asking this Court to make

yearly contributions toward an eventual compendium of permissible and impermissible religious displays.

2. The Facts of this Case Do Not Present an Issue of Undecided Law.

For the Court to accept review on yet another religious display case, one would imagine that it presents a remarkable or at least unexplored area of the law. Wherever the doctrinal "frontiers" of government religious display cases may currently be, however, they have long since traversed the territory that the City now asks the Court to visit.

In *Lynch*, the Court determined that a government owned Nativity Scene that was erected on *private* property not located near public government buildings did not violate the Establishment Clause, when presented in the context of a large number of separate secular displays that were each individual focal points as well as part of an overall "winter wonderland" holiday display. Then, in *Allegheny*, the Court struck down one *privately owned* religious display but upheld another, based upon the overall message vel non of endorsement that each conveyed. And most recently, in *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995), the Court sustained respondent's right as a *private* citizen to engage in religious speech on government property that was designated as a public forum, even though located in front of the symbolic backdrop of the statehouse.

No cases decided by this Court, however, have ever sanctioned a government financed, government owned, government erected religious display located on government

property in front of the symbolic seat of civic secular power.[1] Yet it is undisputed that this case involves exactly that: religious displays that are government owned, located on government property that is not a public forum, and situated in front of the symbolic backdrop of City Hall, the seat of local government. This case thus collects and concatenates the most constitutionally problematic elements from each of the prior cases, and poses a question that all except the City of Jersey City would have assumed was answered long ago. The answer of the Court of Appeals to this question should be more than sufficient for the City to draw the appropriate conclusions, and there is no need for this Court to recount the candy canes and tinsel in order to emphasize that conclusion.

3. This Case Presents No Conflicts Among the Courts of Appeals.

Certiorari is granted only in cases involving matters of public importance that transcend the interests of the private parties, and in cases where there is real and substantial conflict between courts of appeals. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (certiorari granted only in "cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal"). Comparison of this case with the decisions from other circuits cited by the

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1. The City apparently does not rely at all on the alleged effects of Santa, Frosty and the sled in the constitutional analysis, since the petition does not make reference to the modified display in its argument. While the ACLU agrees with the Third Circuit that the "token additions of the secular symbols do little to alter the 'context' or focal points of the City's display" (35a), the absence of these elements in the display the City seeks to defend makes the constitutional result even clearer. Moreover, whatever their importance may be as cultural icons, Santa and Frosty simply do not merit the plenary judicial attention of the Supreme Court.

Petitioner, however, merely supports the unremarkable proposition that cases with diametrically opposite facts often lead to different results.

The present case deals with *government* speech on government property that is at most a *nonpublic* forum, if indeed it is a forum *at all*. Most of the so-called conflicting decisions from other circuits cited by the City, however, involve *private* speech on property either assumed or found to be a *public* forum, where First Amendment free speech rights are implicated. *See Creatore v. Town of Trumbull*, 68 F.3d 59 (2d Cir. 1995) (per curiam) (remanding to district court in light of *Pinette*); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (in banc); *ACLU of Kentucky v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990).

Creatore, *Chabad-Lubavitch*, and *Wilkinson* either presaged or flowed from this Court's decision in *Pinette*. The ACLU of course in no way questions the wisdom of the decision in *Pinette*. (It would be ironic if it did so, given that it represented the prevailing party before this Court in that case.) Indeed, *Pinette* stands for a core canon of first amendment jurisprudence, i.e. that the rights of free expression in a public forum cannot be abridged unless justified by compelling state interests. This case obviously presents no opportunity to explicate on this issue, however, since it involves *government* speech, and absent assertion of such an *individual* right, no countervailing constitutional value is involved.

Of the other cases decided by courts of appeals that Petitioners cite as conflicting, none are relevant or factually apposite. *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir.

1996), dealt with erection of a sculpture of an Aztec mythological figure that the court found was not even "religious" in nature. In *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996), challenge was brought to the national motto "In God We Trust" on United States currency. The motto was upheld based on its peculiar historical and ceremonial usage in solemnizing public functions without denominational preference, which facts clearly distinguish it from a portrayal of the infant Jesus or the Miracle of the Oils. The only case cited by Petitioner that presents facts arguably similar to those at issue here is *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990). There, the court of appeals upheld a public display of a nativity scene in front of a city hall that appeared in a context completely different from that present in Jersey City.

> The display also includes four evergreen trees with lights and stars, two Christmas gift packages with large bows, a Santa Claus figure standing nearby at the corner of the building, a large "Noel" sign, and holiday roping on the building. Decorated lampposts, "Seasons Greetings" sign, roping, colored lights and candles adorned the public library across the street from the Clawson City Hall. . . . . At oral argument, counsel for plaintiff-appellant John Doe acknowledged that the entire display includes the public library and its decorations.

915 F.2d at 245-46. *City of Clawson* may or may not have been correctly decided, but if there is tension with this case, it is factual in nature.

CONCLUSION

For the reasons expressed herein, the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

May 12, 1997

Respectfully submitted,

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Counsel for Respondents American Civil Liberties Union of New Jersey, Robert Lander, Adam Jacobs, Joel Solow, and Ann Sorrel.

FILED
MAY 15 1997
OFFICE OF THE CLERK

(3)

No. 96-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BRET SCHUNDLER, *in his official capacity as mayor of the City of Jersey City*, THE CITY COUNCIL OF JERSEY CITY, *and* THE CITY OF JERSEY CITY, NEW JERSEY,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, *on behalf of its members*, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, *and* ANN SORREL,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1620

BRET SCHUNDLER, *in his official capacity as mayor of the City of Jersey City*, THE CITY COUNCIL OF JERSEY CITY, *and* THE CITY OF JERSEY CITY, NEW JERSEY,
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, *on behalf of its members*, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, *and* ANN SORREL,
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ARGUMENT

The main thrust of Respondents' brief in opposition is their insistence that this case is nothing more than a factual squabble set against the backdrop of settled law. Hardly. The role of religious elements in public culture is an issue that has deeply divided this Court on each occasion the Court has considered it. That has left the law anything but settled. The courts of appeals are also divided, both over the legal standard to be applied to such cases, and over the results that follow from

such standards. The present case is an excellent vehicle for resolving those divisions.[1]

1. Respondents claim that this is an unremarkable case in which "the Third Circuit was merely following the analytical steps required by *Allegheny*." (Br. Opp. at 4). In fact, the Court of Appeals' opinion departs sharply from *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). This Court in *Allegheny* upheld the display of a religious symbol, a menorah, together with a tree and a sign saluting liberty at the entrance to the City-County building. The Court of Appeals in this case struck down a more broadly and more explicitly diverse display -- a menorah, a creche, a tree, and a sign stating that this display and the "others throughout the year" were all intended to "celebrate the diverse cultural and ethnic heritages" of the citizenry. (App. 69a).

Moreover, the Court of Appeals, contrary to *Allegheny* (and to *Capitol Square Review & Advisory Board v. Pinette*, ___ U.S. ___, 115 S. Ct. 2440 (1995)), seems to have promulgated a per se rule against creches in front of government buildings. According to the Court of Appeals,

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[1]Respondents obliquely suggest that this case should not be given plenary review because the Court of Appeals ordered part of it remanded to the District Court. *See* Br. Opp. at 3. But Respondents fail to note that the main issue involved in this petition, the constitutionality of the original display, was not remanded at all, but simply affirmed. Petition App. at 36a-37a. Moreover, the issue that the Court of Appeals *did* remand, the constitutionality of the modified display, *id.* at 37a, involves only the application of the Court of Appeals' chosen legal standard to stipulated facts. In any event, there is nothing novel about this Court granting plenary review to decisions that include partial remands. *See, e.g., Bowen v. Massachusetts*, 487 U.S. 879 (1988).

"Government display of a creche . . . cannot convey a meaning separate from the very act it is meant to portray." (App. 35a); *see also* App. 35a-36a ("We reiterate that Jersey City's display of the creche at the seat of City government power impermissibly conveyed a message of government endorsement of religion."). Such a rigid approach is in stark conflict with *Allegheny*, which requires courts to analyze religious symbols in both their spatial and temporal context.[2]

2. Respondents, however, announce that it was "long ago" settled that "religious displays that are government owned, located on government property that is not a public forum, and situated in front of . . . the seat of local government" are unconstitutional. Petitioners are at a loss as to where or when that was "answered long ago" in Respondents' favor. To repeat, *Allegheny* upheld a menorah displayed by the government in front of its City-County Building. And while it is true that legal title to the menorah lay with Chabad Lubavitch, the Court emphasized that its display was government speech, not private speech. "The menorah is owned by Chabad, a Jewish group, but is stored, erected, and removed each year by the city." 492 U.S. at 587 (footnote omitted). In fact, the government stressed its responsibility for the display with a sign, which read, under the title "Salute to Liberty": "During this holiday season, *the city of Pittsburgh* salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." *Id.* at 582 (emphasis added). What the Court

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[2]Respondents' own reading of *Allegheny* is a bit shaky. They state that "[a]fter finding that the tree was 'clearly the predominant element in the city's display' (*id.* at 617), the Court concluded that the overall impact of the display was secular." (Br. Opp. at 5). But their quotation about "predominant element" comes from section VI of Justice Blackmun's opinion, which he wrote for himself alone, and not for the Court.

found crucial was the message that the menorah, in context, conveyed to a reasonable observer, not who held legal title to it.

3. As Respondents concede, the Sixth Circuit has upheld a city-owned and erected creche displayed in front of City Hall. *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990); *see* Br. Opp. at 9. Thus, not only has the question not been "answered long ago," it is currently dividing the Courts of Appeals. Respondents call this dispute "factual in nature." (Br. Opp. at 9). But after having so loudly insisted that the question was foreclosed as a matter of law, it will not do to say that it is merely factual after all.[3]

Respondents nevertheless insist that there are no (other) real conflicts between the Court of Appeals below and other circuits. Respondents are mistaken. As an initial matter, they simply ignore the division among the courts of appeals over whether to follow Justice O'Connor's mode of endorsement analysis, or Justice Stevens'. *See* Pet. at 11-15. Respondents instead content themselves with distinctions that are either unsupported by the opinion in question or are beside the point.

Respondents claim that the Ninth Circuit's holding in *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996), was based on a determination that the statue of an Aztec deity at issue in that case was not religious at all. But that is simply not so. It *is* true that before applying the endorsement test, the Court determined that the statue was not related to New Age or Mormon beliefs, two claims advanced by the plaintiffs. *Id.* at

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[3]*Cf.* Gilbert & Sullivan, "I am the Captain of the Pinafore", *H.M.S. Pinafore* (1878) ("What, never? No, never! What, never? Well, hardly ever.").

1231. However, as to a third claim, that the statue resembled the religious symbols of the Zapatista rebels in Mexico, the Ninth Circuit found it necessary to apply the endorsement test. Analyzing the statue from the viewpoint of a reasonable observer, whom the court held must be "informed as well as reasonable," *id.* at 1232, the court determined that "[t]he reasonable observer is not an expert on esoteric religions" and "cannot be expected to infer an endorsement of the religion practiced by a revolutionary group in southern Mexico." *Id.* Respondents' claim that the Ninth Circuit's use of Justice O'Connor's endorsement test does not conflict with the test preferred by the Court below is thus mistaken.

Also mistaken is Respondents' characterization of *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996). Respondents think that *Gaylor* upheld the motto "In God We Trust" only because of its "peculiar historical and ceremonial usage." (Br. Opp. at 9.) But the court did not limit its analysis to historical usage. The court engaged in the holistic endorsement inquiry developed by Justice O'Connor and adopted by most other circuits (though rejected by the court below): "[W]e find that a reasonable observer, aware of the purpose, context, and history of the phrase 'In God we trust,' would not consider its use or its reproduction on U.S. currency to be an endorsement of religion." *Id.* at 217.

Next, Respondents say that the remaining courts of appeals' decisions adopting Justice O'Connor's approach involved private speech, not government speech. That is irrelevant. Whether endorsement analysis applies to private speech in a public forum was, of course, another topic of lively debate in *Pinette*. 115 S. Ct. at 2447-50; *id.* at 2452-55 (O'Connor, J., concurring), 2465-69 (Stevens, J., dissenting).

Suffice it to say that both Justice O'Connor's concurrence (joined by Justice Souter and Justice Breyer) and Justice Stevens' dissent decided that it does. It is not surprising that the courts of appeals that are lining up behind either the *Pinette* concurrence or the dissent agree with them. The question here, however, is not *when* endorsement analysis applies, but *how* it applies. Respondents' purported distinction thus actually argues in favor of granting plenary review. The fact that the courts of appeals are applying endorsement analysis not just to government speech cases, but to other types of Establishment Clause claims as well, shows only how urgent it is that the split among the circuits be resolved.

4. Respondents are greatly mistaken when they say that this case presents no undecided issue of law. (Br. Opp. at 6.) This Court has twice wrestled with the question of religious elements in government cultural displays without fully eliminating the confusion of the lower courts -- to say nothing of the annual confusion of mayors and city councils across the country. The courts of appeals' divergence between Justice O'Connor's and Justice Stevens' analyses only deepens the problem.

The present case provides a solution. The undisputed facts show that the creche, menorah, tree and sign at issue are only a small part of a year-round cultural program. Other activities range from the Hindu Grand Phagwah Parade to various ethnic festivals to a broad assortment of flag raisings. And contrary to Respondents' statement in their opposition, (Br. Opp. at 1), the record *does* indicate that some of these involved unattended displays, both inside and in front of City Hall. In fact, Respondents stipulated to that fact. Stipulation of Parties ¶¶ 21-23, App. 70-73a. More to the point, all of the

City's cultural efforts, whether displays, parades, or festivals, are accompanied by the same sign, which ties them all together: "Through this display and others throughout the year, the City of Jersey City is pleased to celebrate the diverse cultural and ethnic heritages of its people." *Id.* ¶ 14, App. 69a, 76a.

Unlike either *Allegheny* or *Lynch v. Donnelly*, 465 U.S. 668 (1984), therefore, this case puts cultural religious symbols in their full context. Both the spatial context and the temporal context of Jersey City's cultural program show it to be just that -- a cultural program. Justice O'Connor's reasonable observer would know that. He or she would be aware that religious elements are natural in cultural activities. And because Jersey City's various cultural efforts do no more than mirror the various cultures of its residents, he or she would be unperturbed.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in our Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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